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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1114

CALIFORNIA, *et al.*, *Petitioners*

v.

SOUTHLAND ROYALTY COMPANY, *et al.*

No. 76-1133

EL PASO NATURAL GAS COMPANY, *Petitioner*

v.

SOUTHLAND ROYALTY COMPANY, *et al.*

No. 76-1587

FEDERAL POWER COMMISSION, *Petitioner*

v.

SOUTHLAND ROYALTY COMPANY, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONS FOR WRITS OF CERTIORARI FILED
February 12 and 16 and May 12, 1977
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VOLUME II
Pages 365-746

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[238] BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

Brief of Commission Staff

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Commission Staff Counsel

Washington, D. C.
June 20, 1975

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[240] BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

Brief of Commission Staff

I. INTRODUCTION

This case involves a legal question of first impression before the Commission. Upon expiration of a fixed-term gas lease are the reversionary interest holders under the lease subject to the constraints of Section 7(b) of the National Gas Act? Seeking resolution of this and related questions two separate petitions for declaratory order have been filed with the Commission.

II. STATEMENT OF THE CASE

A. *Factual Context*

On January 20, 1975, El Paso Natural Gas Company (El Paso) filed in Docket No. CP75-209 a petition for a declaratory order resolving certain questions in connection with the imminent expiration of a 50-year fixed term lease currently held by Gulf Oil

Corporation and others (Gulf, *et al.*).[1] Basically, the facts as presented by El Paso are as follows.

On July 14, 1925, Gulf Production Company, the corporate predecessor of Gulf Oil Corporation (Gulf), as lessee, executed with W.N. Waddell, *et al.*, as lessors, a 50-year [241] fixed term oil and gas lease. By the terms of said lease Gulf obtained the exclusive right to produce and sell oil and gas from 45,771 acres of land in Crane County, Texas. When Gulf, *et al.*'s, leasehold expires on July 14, 1975, the mineral rights, including the rights to natural gas production shall revert to the reversionary mineral interest owners,[2] (hereinafter referred to as Southland, *et al.*).

Presently, Gulf, *et al.*, make percentage-type sale to Warren Petroleum Company, a Division of Gulf Oil Corporation (Warren), of certain quantities of casinghead gas produced from said Crane County acreage. Pursuant to two gas purchase contracts, dated January 26, 1951, and March 1, 1972, Warren sells to El Paso approximately 60,000 Mcf per day of surplus residue gas at the outlet of the Waddell Gasoline Plant, which gas El Paso transports through its jurisdictional facilties for subsequent resale in interstate

[1] Besides Gulf Oil Corporation (Gulf) lessees include B.W.P., Inc.; Highland Production Company, Inc.; W. Nelson Rees; G. Dillard Anderson, Jr.; V. L. DeBolt and John L. Harlan.

[2] The reversionary mineral interest owners include Exxon Corporation, whose interest represents approximately 14% of the term lease gas, and Southland Royalty Company (Southland), whose own interests and those of the estate of Warren Wright and the Penn interests (collectively Mineral Interest Owners) represent approximately 81% of the term lease gas. The remaining 5% interest is divided among more than 100 separate interest holders.

commerce. Approximately 25,000 Mcf per day of such residue gas sold to El Paso is attributable to production from wells on land leased by Gulf, *et al.*

El Paso has learned that Southland, *et al*, are soliciting proposals from intrastate gas transmission companies for the purchase of Southland, *et al.*'s, shares of natural gas from the Crane County acreage produced after July 14, 1975.[3] [242] Anticipating an attempt to divert the leasehold gas from interstate to intrastate markets with concomitant reductions in supply to El Paso's system, El Paso is petitioning the Commission for a declaratory order resolving the following questions:

> (1) May Southland, *et al.*, divert natural gas from interstate commerce to intrastate commerce without prior permission and approval of the Commission?
>
> (2) Must Gulf, *et al.*, obtain abandonment permission and approval in order to cease sales to Warren and to effectuate a transfer to Southland, *et al.*?
>
> (3) May Warren reduce its sales to El Paso to the extent such sales are attributable to production from the subject leasehold property without prior Commission permission and approval?

[3] Southland has contracted to sell its share, approximately 47%, of the gas in question to Intratex Gas Corporation, a subsidiary of Houston Natural Gas Corporation. The contract, extending for a period of 20 years after July 14, 1975, calls for a base price of $1.90 per million Btu plus fixed increases of 2.5 cents per million Btu on January 1, 1976, and each 6 months thereafter.

On April 8, 1975, Texaco Inc. (Texaco) filed in Docket No. CI75-594 a petition for a declaratory order to resolve a question similar to a question propounded by El Paso in Docket No. CP75-209 (question 1, *supra*) but stated differently. Texaco asks whether a lessee by making an interstate gas sale can commit more than its real property interest (*i.e.*, its rights under its lease) thereby both encumbering forever the real estate and imposing upon the nonparticipating mineral fee owner the obligations of Section 7 of the Natural Gas Act.

The facts underlying Texaco's request for declaratory relief are notably similar to the facts alleged in Docket No. CP75-209. On August 7, 1925, Gulf, as lessee, and Goldsmith, *et al.*, as lessors, executed a 50-year fixed term oil and gas lease by the terms of which Gulf obtained exclusive mineral rights to some 19,840 acres of land in Ector County, Texas, until August 7, 1975, whereupon such mineral rights revert to the reversionary mineral interest owners [243] (hereinafter referred to as Texaco, *et al.*).[4] Gulf sells gas from its Ector County leasehold to Phillips Petroleum Company under a percentage-type casinghead gas sales contract. Phillips then sells the residue gas from the tailgate of its Goldsmith Plan to El Paso under Phillips FPC Gas Rate Schedule Nos. 7, 32, 33, 483, and 497. Approximately 18,000 Mcf per day of the residue gas sold to El Paso by Phillips is attributable to production from the Ector County lease.

[4] By deed executed May 4, 1929, Texaco acquired a ¼ interest in the reversionary mineral rights to the Ector County property from Leon Goodman, *et al.* Presumably, Leon Goodman, *et al.*, retain the remaining ¾ reversionary interest.

B. *Procedure*

By order issued June 3, 1975, the Commission consolidated the two proceedings and invited the parties to submit briefs on the legal issues presented. Noting that the facts in the two proceedings were clear and uncontested, the Commission determined that the legal questions presented would be resolved without evidentiary hearings on the basis of the filings and briefs submitted in this consolidated proceeding.

III. Staff Position

In both proceedings El Paso's interest is in maintaining its present supply of gas. At stake for El Paso are approximately 15.7 million Mcf of gas annually or over 1 percent of its total annual firm requirements. On the other side, Reversioners (Southland, *et al.*, and Texaco, *et al.*) collectively stand to realize up to $21 million more annually by selling gas from the subject leaseholds to the intrastate market.[5] Thus the sides are clearly drawn; and to both [244] sides the issue of overriding concern, no matter how it is phrased, is whether Reversioners, who according to Texas law will control the gas after the expiration of the subject leases,[6] must seek Commission permission and approval under Section 7(b) of the Natural Gas Act before diverting the gas. This is the nature of the

[5] This calculation assumes that all Reversioners execute contracts upon terms like those in the Southland-Intratex contract (see note 3, *supra*) and is based upon the approximate current national rate for interstate sales of 51 cents per Mcf of gas.

[6] *Gulf Oil Corporation* v. *Southland Royalty Company*, 496 S.W. 2d 547 (1973).

single question presented in Docket No. CI75-594 and of question no. 1 presented in Docket No. CP75-209.

It is the position of the Commission staff that the gas from the subject acreage, whether produced before or after expiration of the leases, is dedicated to the interstate market and that by virtue of their control over that gas Reversioners are subject to the constraints of Section 7(b). As will be shown, only this position is faithful to both prior precedent and the public interest.

IV. Argument

A. *Upon expiration of the fixed-term gas leases Reversioners are subject to the constraints of Section 7(b)*

Not surprisingly, the various pleadings submitted by those representing Reversioners' interests contend that Reversioners need not obtain prior Commission abandonment authorization in order to sell the gas to the intrastate market. Their contention is based upon the fiction that there is a distinction for purposes of dedication between gas from the same reserve produced before and after the expiration of a lease. Th claim is that only the gas produced during the term of the 50-year lease is within the authority of Lessees to sell and is relied upon by El Paso; therefore, only the gas produced prior to the expiration of the leases is dedicated to interstate commerce. Gas produced after expiration of the leases is, in Reversioners' view, undedicated, and so they argue that the Commission has no jurisdiction to dictate to whom the gas must be sold.

[245] To the contrary, the gas which will revert to the control of Reversioners after the leases expire is

dedicated to the interstate market. By virtue of their succession to control over that gas Reversioners, as natural gas companies, become subject to the requirements of Section 7(b).

1. *The gas produced from the subject acreage after lease expiration is dedicated to interstate commerce.*

It is well established that there can be no withdrawal of gas once dedicated to the interstate market from continued interstate movement without permission and approval of the Commission under Section 7(b).[7] Since the gas produced by Lessees is sold for resale to El Paso which transports the gas in interstate commerce, clearly such gas is dedicated to interstate commerce. Gas from the entire acreage of both leaseholds is dedicated since Lessees are restricted neither as to the amount of gas which may be sold from the subject acreage nor as to the area from which gas may be produced on the subject acreage. Reversioners would, of course, have the Commission believe that Lessees cannot dedicate to the interstate market volumes attributable to the mineral estate of Reversioners. There is no question that Lessees had authority to sell all the gas from the reserves within the fixed term of the lease.[8] The mere fact that they have not yet done so does not prevent the gas in the reserve from being dedicated to interstate commerce.

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[7] *Atlantic Refining Co.* v. *P.S.C.N.Y.*, 360 U.S. 378, 389 (1959); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 156 (1960).

[8] Reversioners have a fixed royalty interest of ⅛ part of the value of the casinghead gas (calculated at the rate of 4 cents per Mcf) with no right to take gas in kind.

An artificial cut-off in time in the dedication of gas reserves to the interstate market in deference to the terms of a lease is without foundation. The mere expiration of a lease does not somehow interrupt the dedication of gas. Case law consistently refers to dedication of reserves as [246] uninterruptible. It has previously been held that neither expiration of contracts[9] nor producer successions[10] can impede the continued interstate flow of gas once dedicated. Referring to an assignment of interest under a lease, the court in *Hunt* v. *FPC*[11] said,

> Like the ancient covenant running with the land the duty to continue to deliver and sell flows with the gas from the moment of the first delivery down to the exhaustion of the reserve, or until the Commission on appropriate terms, permits cessation of service under Section 7(b). [p. 342]

For the same reason that contract terms and assignments do not affect dedication of gas reserves, neither should expiration of a lease. Once reserves are dedicated to the interstate market they become a part of the Commission's regulatory scheme, safeguarded by Section 7(b), to ensure continuity and stability of service. To allow contract terms,[12] assign-

[9] *Amoco Production Company, et al.*, 46 FPC 1390 (1971).

[10] Opinion No. 467, *Cumberland Natural Gas Company*, 34 FPC 132 (1965).

[11] 306 F. 2d 334, (1962), reversed on other matters 376 U.S. 515 (1965).

[12] *California* v. *Lo-Vaca Gathering Company*, 379 U.S. 366, 369-370 (1965).

ments[13] or the instant fixed-term leases to control the flow of gas reserves would undermine that regulatory scheme. Limiting reserve dedication to the term of a lease would allow lessors to usurp the function of the Commission and frustrate the purposes of Section 7(b) by entering into short-term leases, leases terminable at will, and bilateral agreements with lessee-producers to agree to [247] minimize production dedicated to the interstate market until the lease expires at which time they may avail themselves of higher intrastate prices.[14]

It hardly needs to be said that allowing producers to flaunt Commission regulation through the calculated use of leasing arrangements would disserve the public interest. As long as the present dichotomy between interstate and intrastate gas prices continues "limited-term" leasing arrangements would flourish with the necessary concomitant that the supply of gas to the interstate market would suffer. In the instant circumstances there is a potential diversion from the interstate market (and from El Paso which from Sepember 1974 to August 1975 curtailed approximately 12 percent of its firm requirements[15])

[13] Opinion No. 724, *Blair-Vreeland*, issued March 18, 1975 (53 FPC ——), in Docket No. CI74-331, mimeo p. 12. Opinion and Order Denying Rehearing and Motion to Stay issued May 14, 1975.

[14] In a different context, attempts such as this to pit the intrastate market against the interstate market in an effort to maximize gas prices have been rejected by the Commission. See, *e.g.*, order issued December 20, 1974, *Wayne J. Spears*, in Docket No. CI75-218; and order issued February 27, 1975, *James M. Forgotson, Sr.*, in Docket No. CI75-392.

[15] El Paso's Report of Gas Supply and Requirements, 1974-75 (FPC Form 16).

of 15.7 million Mcf of gas annually. On the other hand, a Commission determination that reversioners under expired gas leases are subject to Section 7(b) would impose a minimal burden. Few would be adversely affected by such a determination because, as Reversioners have pointed out, gas leases that are limited in duration are now extremely rare.[16] Furthrmore, Reversioners must have understood that their interest under the leases (other than royalties) was contingent upon the extent of reserve depletion during the 50-year term and that there may be no gas remaining at term's end (an event probably considered likley in the minds of the original parties to the lease).

[248] In support of the contention that the gas produced after the expiration of the subject leases will be undedicated, it is stressed that because El Paso was on notice of the limited term of the leases there was no reliance upon the receipt of gas after the expiration of said leases. The lack of reliance by El Paso upon gas produced after the expiration of the leases cannot be said to compel abrogation of Section 7(b) control over the gas. As shown in Opinion 467 (*Cumberland*), which was reaffirmed recently in Opinion No. 724 (*Blair-Vreeland*), a producer's interest in acreage can be "effectively dedicated irrespective of the fact that at its time of dedication the gas reserves in such acreage may have been unproven. . . ." (at p. 137). Although the interstate buyers in *Blair-Vreeland* and *Cumberland* did not

[16] See Petition to Intervene and Answer of Mineral Interest Owners to Petition for Declaratory Order in Docket No. CP75-209 at page 5, footnote 12 and accompanying text.

contract for gas in reliance upon undiscovered reserves, the Commission nevertheless held that the undiscovered reserves were dedicated to the interstate buyers.

It has further been argued that the decision in *El Paso* v. *Bass,* 48 FPC 1269 (1972), supports the conclusion that Reversioners will be free to sell the subject gas to whomever they choose without abandonment authorization from the Commission. Perry Bass leased gas interests to Shell Oil Company (Shell) but retained an option to convert his royalty interest to a working interest upon "payout of the well." Upon electing to convert his royalty interest to a working interest, Bass sought to sell his gas to Natural Gas Pipeline Company of America (Natural) rather than El Paso, to whom Shell had been selling the leasehold gas. The Commission decided that Bass' prior royalty did not make him a seller in interstate commerce nor did his conversion from a royalty to a working interest; therefore, Bass was free to sell his share of the gas to Natural without prior abandonment authority.

Bass never reached the question of dedication of reserves to the interstate market because there was no attempt to divert the gas to the intrastate market. Because in *Bass* the Commission was not dealing with the public interest in maintaining the flow of interstate gas, about which the Commission is paramountly concerned, *Bass* can hardly be said to [249] be controlling over the instant questions. Furthermore, the decision in *Bass* was influenced in large measure by the Commission's reluctance to discourage farmout arrangements because such arrangements tend to pro-

mote interstate market gas dedication. The instant case, of course, does not deal with farmouts and to that extent *Bass* is further distinguishable.

Bass' distinguishability notwithstanding, the holding of *Bass* is readily reconciled with the decision staff urges herein. From the outset of Shell's sales of gas to El Paso Shell lacked the authority to sell the proportionate share of the reserves attributable to Bass' potential working interest, and, therefore, Bass' working interest gas was never dedicated to El Paso. Since well payout is not an uncommon occurrence, it was likely not within the contemplation of Bass and Shell that Bass' proportionate working interest share of gas would be dedicated by Shell. In the instant circumstances, however, Lessees had the authority from the outset to sell all the gas from the subject reserves, and, therefore, all the gas was dedicated to El Paso. When the 50-year fixed-term leases in question were executed it was likely not within the contemplation of the parties to the leases that any commercial amounts of gas would remain after lease expiration; hence, there was no restriction upon dedication by Lessees.

No distinction can properly be made for purposes of dedication of reserves to the interstate market, between gas from the same reserves produced before and after the expiration of a lease. The gas once dedicated to the interstate market by Lessees remains dedicated subject to the Commission's control and the provisions of Section 7(b).

2. *By virtue of their succession to control over gas dedicated to the interstate market Reversioners, as natural gas companies, become subject to the requirements of Section 7(b).*

[250] Commission permission and approval prior to an abandonment is required under Section 7(b) of the Natural Gas Act only of natural gas companies. Are Reversioners natural gas companies subject to the requirements of Section 7(b)?

Following *Mobil Oil Corporation* v. *FPC*, 463 F.2d 256 (1971), *Bass* held that a royalty interest does not necessarily subject the interest holder to Commission jurisdiction because royalty provisions are not sales. Furthermore, the Commission ruled that Bass did not become jurisdictional when he converted his royalty interest to a working interest because he was not thereby automatically bound by the Commission's certification of the Shell-El Paso sale. By similar reasoning, since a reversionary interest is not a sale the interest holders are not by virtue of that interest alone subject to the jurisdiction of the Commission.

However, when Reversioners take over the interest in the subject reserves on July 15, 1975, and August 8, 1975, they become bound by prior Commission certification and therefore step into the shoes of their predecessors as natural gas companies. Bass was not bound by prior certification because the gas he sought to sell was never dedicated. On the other hand, because the reserves that Revisioners control have been dedicated to interstate commerce Reversioners must

step into the shoes of Lessees in order that there might be consistency of treatment of such reserves."

A different conclusion would yield the anomalous result that there is gas dedicated to the interstate market, but the party controlling the gas is not a natural gas company subject to the proscriptions of Section 7(b) of the Natural Gas Act. Therefore, on July 15, 1975, and August 8, 1975, Reversioners will assume control over reserves dedicated to the interstate market thereby assuming the status of a natural gas company subject to the requirements of Section 7(b) with respect to the gas reserves.

[251] B. *Lessees Need Not Obtain Commission Permission And Approval In Order To Cease Sales After Expiration Of The Leases.*

Assuming Reversioners are required to file an application pursuant to Section 7(b) a like filing by Lessees is not required, although a technical construction of the applicable Regulations might dictate otherwise. Section 2.64 of the General Policy and Interpretations (18 CFR 2.64) allows that a producer (Lessees) need not file for abandonment permission and approval if a certificate is required of its successor (Reversioners). But if Reversioners continue the percentage-type sales to Warren/Phillips (Plant Operators), Section 2.64 would appear to be inoperative because under the provisions of Section 154.91(e) of the Regulations (18 CFR 154.91(e)) no certificate would be issued to Reversioners as producers selling gas under a percentage-type contract. If Section 2.64 is deemed

[17] See Opinion No. 408, *Graridge Corporation (Operator), et al.*, 30 FPC 1165, 1162 (1963).

inoperative then an application pursuant to Section 7(b) would be required of Lessees. Notwithstanding this technical construction, an abondonment application by Lessees would be both superfluous and inconsistent with the purpose of Section 2.64 to avoid unnecessary filings. Accordingly, Lessees should not be required to obtain permission and approval in order to cease sales upon the expiration of the leases since the sales may not be discontinued solely as a result of the expiration of the leases.

C. *Plant Operators Are Not Required To Obtain Commission Permission And Approval In Order To Reduce Sales To El Paso*

Staff notes the contention in some of the pleadings that, no matter the disposition of other questions in this proceeding, Plant Operators are not required to have Section 7(b) permission and approval prior to curtailing deliveries to El Paso. Plant Operators are obligated to El Paso, pursuant to their contracts, to deliver the full volume of surplus residue gas available. The claim is that under such a contract Plant Operators are obligated only to their best effort and that no abandonment authorization is required if [252] deliveries need be curtailed due to no fault of their own. Whether or not that contention is correct, Plant Operators need not file an application pursuant to Section 7(b). Under Section 154.91(e) Plant Operators need only file an annual report listing the producer (Lessees) as no longer supplying their plant.

V. Conclusion

Applicable law and the public interest in future dedication of gas to the interstate market compel the con-

clusion that Reversioners must obtain Commission permission and approval pursuant to Section 7(b) prior to diverting their interests in the subject gas from its interstate commitment. This conclusion and the applicable Commission Regulations lead to the further results that Lessees and Plant Operators are not subject to Section 7(b) upon expiration of the leases on July 14, and August 7, 1975. The Commission should issue a declaratory order in this proceeding consistent with these conclusions.

Respectfully submitted,

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Edward Ross Mark

/s/ GEORGE H. WILLIAMS, JR.
George H. Williams, Jr.
Commission Staff Counsel

Washington, D. C.

June 20, 1975

[253] (CERTIFICATE OF SERVICE OMITTED IN PRINTING)

. . . . . .

[254] UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

(RECEIVED JUNE 23, 1975)

Brief of the People of the State of California and the Public Utilities Commission of the State of California

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June 19, 1975

[255] UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

Brief of the People of the State of California and the Public Utilities Commission of the State of California

Pursuant to the Federal Power Commission (Commission) Order Consolidating Proceedings, Granting Petitions to Intervene, and Prescribing Schedule for Filing of Briefs, issued on June 3, 1975 in the above entitled proceeding, the People of the State of California and the Public Utilities Commission of the State of California (California), intervenors, respectfully submit their brief in this proceeding.

CALIFORNIA'S INTEREST IN THIS PROCEEDING

California has intervened in this proceeding before the Commission in order to represent the interest of its more than 20 million residents who directly and indirectly consume natural gas. The California Public Utilities Commission is the regulatory agency charged by Article XII of the Constitution of the State of California with the responsibility *inter alia*, of regulating natural gas sold by distributors within California. The state depends on natural gas as the basic

source of residential energy and, to a lesser degree, of industrial energy. Approximately 80 percent of the supply of natural gas required to meet the needs of the California market must be imported from sources outside the state. El Paso Natural Gas Company (El Paso) is a major supplier of natural gas for use within California. During the last several years, California distributors have been faced with declining deliveries from El Paso. If El Paso loses the sources of supply at issue in the subject proceeding, there will be a direct effect on the volume of gas available to California distributors.

[256] STATEMENT OF FACTS

This proceeding was instituted on January 20, 1975, when El Paso filed in Docket No. CP75-209 a petition for a declaratory order resolving questions in connection with the expiration of a 50-year fixed term lease currently held by Gulf Oil Corporation (Gulf) which will expire on July 14, 1975. On July 14, 1925, Gulf Production Company, predecessor of Gulf, obtained a 50-year fixed term oil and gas lease from one W. N. Waddell. When Gulf's leasehold expires on July 14, 1975, the mineral rights, including the rights to natural gas production shall revert to the reversionary mineral interest owners. The reversionary mineral interest owners plan to sell the natural gas produced under the lease to intrastate pipeline companies. Currently, Gulf sells the natural gas produced under the lease through is subsidiary, Warren Petroleum Company, to El Paso for interstate use.

Based on the above facts, El Paso posed three questions to the Commission:

1. May Southland, *et al.* (the reversionary interest holders) divert natural gas from interstate commerce to intrastate commerce without prior permission and approval of the Commission?

2. Must Gulf, *et al.* obtain abandonment permission and approval in order to cease sales to Warren Petroleum Company and to effectuate a transfer to Southland, *et al.*?

3. May Warren Petroleum Company reduce its sales to El Paso to the extent such sales are attributable to production from the subject leasehold property without prior Commission permission?

Subsequent to the submission of these questions to the Commission, Gulf advised the Commission that Warren Petroleum Company is owned by Gulf so that questions 2 and 3 are synonymous.

On April 8, 1975, Texaco Inc. (Texaco) filed in Docket No. CI75-594 a petition for a declaratory order to resolve issues similar to those raised by El Paso in Docket No. 75-209. Texaco alleged that it is the reversionary mineral interest owner of a 50-year lease also held by Gulf. Texaco stated that the proper question is whether a lessee, by making an interstate gas sale, can commit more than its real property interest thereby encumbering forever the real estate and imposing upon the nonparticipating mineral fee owner the obligations of Section 7 of the Natural Gas Act. The Commission consolidated the two proceedings in its order of June 3, 1975.

[257] CALIFORNIA'S POSITION

California takes the position that the volume of gas currently flowing in interstate commerce that is attributable to wellhead gas produced under both 50-year leases with El Paso cannot be diverted from interstate commerce without Commission approval. There are basically two issues to be resolved. May the lessor reversionary mineral interest owner divert natural gas from interstate commerce to intrastate commerce without Commission approval and may the lessee seller of natural gas in interstate commerce to El Paso reduce the amount of natural gas it supplies to El Paso without Commission approval? California believes that these questions must be answered in the negative. It is well established that once natural gas is dedicated to interstate commerce it cannot be removed therefrom without abandonment authorization pursuant to Section 7(b) of the Natural Gas Act. The contractual arrangements involved in the sale of gas cannot override the provisions of the Natural Gas Act. In both factual situations being considered in this proceeding, the gas involved is, at present, physically moving in interstate commerce directly from the wellhead. Therefore, under the Natural Gas Act, Commission approval must be obtained before gas may be diverted from interstate use. Additionally, it is California's position that even if certain contractual relationships constitute exceptions to the authority of the Natural Gas Act, the parties to this proceeding do no come within those exceptions.

Argument

I

The Reversionary Mineral Interest Owners Cannot Divert Natural Gas From Interstate Commerce to Intrastate Commerce Without Prior Permission of the Commission.

Exxon Corporation (Exxon) has argued that this issue was resolved by the Commission in *El Paso Natural Gas Company* v. *Perry R. Bass,* 48 F.P.C. 1269 (1972). In that case, the Commission ruled that the owner of a royalty interest in a gas well who elected to take a one-half working interest in the well and sell the gas to another pipeline company need not obtain abandonment authority from the Commission. Bass was the royalty interest holder who chose to convert his royalty interest into a one-half share working interest. At the time Bass made the conversion, gas was being produced from the well by Shell Oil Company and Shell was selling the gas to El Paso. California asserts that there are critical factual differences that distinguish the *Bass* case from the instant case. The agreement under which Bass owned a royalty interest contained provisions which expressly prohibited Shell from disposing of Bass' share of the gas [258] production. Further, the Commission found that as a matter of public policy the type of agreement involved in the *Bass* case, called a "farm-out" agreement, should be exempt from the requirements of abandonment authorization because such agreements encouraged oil and gas exploration.

In the instant case, the agreements between the parties do not specifically prohibit the gas producer

from encumbering a percentage of gas belonging to the reversionary interest owner. In this case, the entire gas production is currently in interstate commerce and it is this total amount that the reversionary interest holders propose to remove from interstate commerce.

The public policy in the *Bass* case is not applicable in the present situation of gas shortages in the United States today. There is sufficient incentive to produce new gas wells without providing special exemptions for particular contractual agreements. Rather, public policy today dictates that the Commission strictly limit contractual exemptions from the Natural Gas Act.

The emphasis in the instant proceeding should not, however, be placed on the contractual arrangements as Exxon has argued. Rather, the Commission should rely on the fact that the gas in issue is currently dedicated to interstate commerce by its physical movement in El Paso's pipeline. The United States Supreme Court in the cases of *Sunray Mid-Continent Oil Company* v. *Federal Power Commission,* 364 U.S. 137, 4 L.Ed. 2d 1623; and *California* v. *Lo Vaca Gathering Co.,* 379 U.S. 366, 13 L.Ed. 357, held that the movement of natural gas in interstate commerce, not the contractual arrangements between the parties, dictated the application of the Natural Gas Act.

In the *Sunray Mid-Continent Oil Company* case, the Court addressing the status of the contract in dispute stated:

> "It is apparent that the Commission's order in no way violates the integrity of petitioner's contract with United. During its term, both parties

are bound by it to the same extent as any member of this regulated industry. When it expires, petitioner, to be sure, will be under an obligation to continue to deliver gas to United on the latter's request unless it can justify an abandonment before the Commission."[1]

[259] The Court went on to state:

"An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval."[2]

The *Sunray Mid-Continent Oil Company* case clearly asserts the authority of the Natural Gas Act over gas flowing in interstate commerce regardless of the contents of the contractual agreements between the parties.

While the facts in the *Lo Vaca Gathering Company* case are somewhat different from those in the instant proceeding, the case is relevant in that it reiterated the rule that it is the movement of gas in interstate commerce that dictates the coverage of the Natural Gas Act and the authority of the Federal Power Com-

[1] *Sunray Mid-Continent Oil Company* v. *Federal Power Commission* 4 L.Ed. 2d 1623 at 1637

[2] *Sunray Mid-Continent Oil Company, supra* at 1637.

mission, not the contractual arrangements between the parties.

II

The Seller of Natural Gas in Interstate Commercerce to El Paso May Not Reduce the Amount of Natural Gas It Supplies to El Paso Without Commission Approval

California argues that the reasoning stated in Section I above also applies to this issue. Gulf cannot reduce its sales of gas in interstate commerce without abandonment authority from the Commission. Mere reliance on the reversionary mineral interest owners' legal arguments is not acceptable to justify a reduction in gas supply to El Paso. If Gulf cannot obtain abandonment authority from the Commission, it cannot reduce the volume of gas it is currently supplying to El Paso. Gulf has a duty to protect the interstate flow of the natural gas in question. In addition to the reasoning in Section I, California asserts that Gulf as a gas producer clearly comes within the doctrine of *Phillips Petroleum Co.* v. *Wisconsin* 347 U.S. 672, 98 L.Ed. 1035. In the *Phillips* case the Court held that the Commission has jurisdiction over "well-head" sales of natural gas by the producer.

Gulf as well as the reversionary mineral interest owners cite the case of *Mobil Oil Corporation* v. *Federal Power Commission*, 463 F 2d 256 (1972) to establish that neither Gulf nor the reversionary interest owners come under the [260] Commission's jurisdiction when their contract expires. In the *Mobil* case, the lessor was a mere royalty owner under a

land lease agreement. The lessor permitted oil and gas exploration on its land not knowing whether there would be actual production. The Court in the *Mobil* case held that under that fact situation the Commission had no jurisdiction over the royalty interest.

California submits that in view of the two United States Supreme Court cases cited above and the current natural gas situation in the United States today, both law and public policy dictate that the *Mobil* case should not be applied. However, if the Commission finds that the *Mobil* case is applicable, California questions whether the reversionary mineral interest owners in the instant proceeding can be categorized as mere lessors that had no knowledge of whether oil and gas would be produced on their lands. Exxon and Texaco as well as other reversionary mineral interest owners in this proceeding are oil and gas corporations that purchased a share of the reversionary mineral interest in the subject property knowing that the gas reserves were proven and that the field was substantially developed. As in case of *U.G.I.* v. *Continental Oil Co.*, 381 U.S. 392, 14 L.Ed. 2466, the agreements involved in the instant proceeding are such that they are very close in economic effect to conventional sales of natural gas. Therefore, the reversionary mineral interest owners in the instant proceeding are better categorized as royalty owners engaged in the sale of natural gas in interstate commerce for resale and therefore come within the purview Section 1(b) of the Natural Gas Act.

CONCLUSION

For the above stated reasons, California respectfully requests that the Commission find that the natural gas in question comes within its jurisdiction and that abandonment authority must be sought before the natural gas can be diverted to intrastate use. In this time of natural gas shortage in interstate commerce, the Commission must strictly [261] limit those instances where agreements between private parties can avoid the authority of the Natural Gas Act and the Commission.

Respectfully submitted,

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Dated: June 19, 1975

[262]

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(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

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[264]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Docket No. CP75-209
EL PASO NATURAL GAS COMPANY

Docket No. CI75-594
TEXACO, INC.

(RECEIVED JUNE 23, 1975)

Initial Brief of El Paso Natural Gas Company

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June 20, 1975

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UNTED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Docket No. CP75-209
EL PASO NATURAL GAS COMPANY

Docket No. CI75-594
TEXACO, INC.

Initial Brief of El Paso Natural Gas Company

EL PASO NATURAL GAS COMPANY ("El Paso"), pursuant to Section 1.29 of the Commission's Rules of Practice and Procedure[1] and in accordance with the briefing schedule established herein, respectfully submits this initial brief in the above-styled and docketed proceeding.

I.

STATEMENT OF THE CASE

This proceeding is a consolidation of two proceedings involving the issue of the necessity for abandonment authorizations pursuant to Section 7(b) of the Natural Gas Act as a result of the forthcoming expiration of two 50-year fixed term oil and gas leases.

The first lease was executed on July 14, 1925, between Gulf Production Company, the corporate predecessor of Gulf Oil Corporation ("Gulf"), as lessee, and W. N. Waddell, *et al.*, as lessors (hereinafter re-

[1] 18 C.F.R. Section 1.29 (1974).

ferred to as the "Waddell lease").[2] According to El Paso's information and belief there are currently six other individual and corporate [270] lessees besides Gulf subject to the Waddell lease.[3] All lessees including Gulf are hereinafter referred to as "Gulf, *et al.*"

By the terms of the Waddell lease, Gulf obtained the exclusive right of exploiting 45,771 acres of land in Crane County, Texas, and producing oil and gas therefrom. Upon execution of the lease, Gulf commenced drilling operations on the land and has continuously conducted operations thereupon to the present date. At the present time, Gulf is operating approximately 925 producing oil and gas wells on the land.

On January 26, 1951, El Paso, as buyer, and Gulf, as seller, executed a residue gas purchase agreement

[2] A true conformed copy of this oil and gas lease, recorded in Volume 10, pp. 397-400 of the Deeds Records of Crane County, Texas, is attached to El Paso's Petition for Issuance of a Declaratory Order as Exhibit "A" and made a part thereof. An amendment to this oil and gas lease dated March 16, 1926, recorded in Volume 12, pp. 205-206, of the Deeds Records of Crane County, Texas, was executed by the same parties, covering certain lands in Crane County, Texas, as described therein. A true copy of this amendment is attached to El Paso's original petition as Exhibit "B" and made a part thereof.

[3] According to El Paso's information and belief these lessees are: (1) B.W.P., Inc., a corporation duly incorporated under the laws of the State of Texas, (2) Highland Production Company, Inc., a corporation duly incorporated under the laws of the State of Texas, (3) W. Nelson Rees, an individual who resides in Odessa, Ector County, Texas, (4) G. Dillard Anderson, Jr. an individual who resides in Midland, Midland County, Texas, (5) V. L. De Bolt, an individual who resides in Odessa, Ector County, Texas, and (6) John L. Harlan, Trustee, an individual who resides in either El Paso, El Paso County, or Monahans, Ward County, Texas.

by which El Paso agreed to buy surplus residue gas from Gulf's natural gasoline extraction plant in Crane County, Texas, called the Waddell Gasoline Plant.[4]

Effective November 1, 1957, Gulf transferred to Warren Petroleum Corporation, a wholly owned subsidiary, certain facilities including the Waddell Plant with its related gathering lines and the Gulf-El Paso residue gas purchase agreement dated January 26, 1951. Gulf entered into a percentage-type contract for the sale of casinghead gas from the Waddell lease with Warren Petroleum Corporation. Effective December 31, 1971, Warren Petroleum Corporation was merged into its parent corporation, Gulf Oil Corporation. From that point on the properties previously owned by Warren Petroleum Corporation have been operated in the name of Warren Petroleum Company ("Warren") as a division of Gulf.

On March 1, 1972, El Paso and Warren entered into an additional residue gas purchase agreement assuring El Paso of a continuing [271] supply of quantities of residue gas from the Waddell Gasoline Plant.[5] This agreement includes sales of residue gas attributable to certain gas wells operated by Gulf located on the Waddell lease.

[4] This residue gas purchase agreement, and subsequent amendments thereto, constitute Warren Petroleum Company's FPC Gas Rate Schedule No. 43. The Commission granted a certificate of public convenience and necessity authorizing the sale of residue gas to El Paso from the Waddell Gasoline Plant pursuant to Warren Petroleum Company's Rate Schedule No. 43 at Docket No. G-13445, 19 F.P.C. 1151 (1958). As indicated *infra* Warren Petroleum Company is a division of Gulf.

[5] This residue gas purchase agreement constitutes Warren's FPC Gas Rate Schedule No. 66. The Commission granted a certificate of public convenience and necessity authorizing the sale of residue

El Paso takes delivery of the surplus residue gas, which Warren sells and El Paso purchases pursuant to Warren's FPC Gas Rate Schedule Nos. 43 and 66, into its pipeline system at the outlet at the Waddell Gasoline Plant and transports it through its jurisdictional facilities for subsequent resale in interstate commerce.[6] El Paso purchases, transports, and resells approximately 60 million cubic feet of such surplus residue gas daily.

Of the surplus residue gas purchased by El Paso at the outlet of the Waddell Gasoline Plant, approximately 25 million cubic feet daily is attributable to production from wells on land leased by Gulf, *et al.* pursuant to the Waddell lease. All lessees other than Gulf make percentage-type sales to Warren of casinghead gas produced from the acreage covered by the Waddell lease. Since the merger of Gulf and Warren, Gulf no longer makes such sales.

By the terms of the Waddell lease, the leasehold estate expires fifty years after date of execution, which is July 14, 1975. Gulf, *et al.* sought to extend the termination date of the lease by either 4,661 or 4,286 days on the grounds that they are entitled to such additional days of production because of delays and interrup-

gas to El Paso from the Waddell Gasoline Plant pursuant to Warren's FPC Gas Rate Schedule No. 66 at Docket No. CI72-760 (issued July 22, 1974).

[6] At the following docket numbers, the Commission granted El Paso certificates of public convenience and necessity for the construction and operation of pipeline and compression facilities needed to transport gas from the Waddell Gasoline Plant: G-1629, 10 F.P.C. 644 (1951); G-2371, 13 F.P.C. 1008 (1954); G-10499, 16 F.P.C. 1354 (1956); and G-12580, 19 F.P.C. 393 (1958).

tions arising out of their compliance with regulatory orders of the Texas Railroad Commission. The Supreme Court of Texas resolved the issue in *Gulf Oil Corporation* v. *Southland Royalty,* 496 S.W.2d 547 (1973), by holding that the expiration date of the lease was not extended and the leasehold interest of Gulf, *et al.* shall therefore expire on July 14, 1975. The mineral rights, including the rights to natural gas production, by Texas law shall therefore revert to the reversionary interest owners on July 14, 1975.

Presently, the reversionary interest rights to the oil, gas, and other minerals produced from the acreage covered by the Waddell [272] lease are owned, held, or claimed in major portion by Exxon Company, U.S.A., a division of Exxon Corporation ("Exxon") and by Mineral Interest Owners. Mineral Interest Owners includes Southland Royalty Company ("Southland"), William Y. Penn, *et al.,* Trustees, and Trustees Under the Will of Warren Wright. Mineral Interest Owners together own approximately 81 percent of the acreage covered by the Waddell lease. Exxon owns approximately 14 percent of the acreage and the remaining 5 percent is owned by several other individuals and corporations.[7] All of the reversionary interest owners will together hereinafter be referred to as "Southland, *et al.*"

Upon termination of the Waddell lease and reversion of the mineral interest rights thereunder, Mineral

[7] A list of all said owners is attached to El Paso's original petition as Exhibit "C". All listed owners were served in this action by El Paso.

Interest Owners have agreed to sell to Intratex Gas Company ("Intratex"), for resale solely in intrastate commerce, the gas produced from the wells presently covered by the Waddell lease.[8] Exxon solicited proposals for the purchase of the gas attributable to its reversionary interest rights upon expiration of the Waddell lease for resale in intrastate commerce.[9]

[273] On January 17, 1975, El Paso filed a Petition for Issuance of a Declaratory Order with the Federal Power Commission ("Commission") in order to resolve three legal issues. These questions are basically whether either Warren, Gulf, *et al.,* or Southland, *et al.* must file for Commission abandonment authorization pursuant to Section 7(b) of the Natural Gas Act

[8] In their Petition to Intervene and Answer, Mineral Interest Owners state that Southland Royalty Company has entered into a contract to sell its interest in the gas to Intratex, an intrastate buyer of gas, which is a wholly-owned subsidiary of Houston Natural Gas Corporation, a distributor of gas in the City of Houston, Texas, and environs. They also state that the other Mineral Interest Owners have entered or in the near future will enter into similar contracts with Intratex.

By letter dated February 21, 1975, El Paso sent to the Commission articles from The Wall Street Journal, February 13, 1975, page 20, and The Oil Daily, February 13, 1975, page 1, which indicate that Southland concluded arrangements for the sale of its share of natural gas to Intratex at a base price of $1.90 per million British thermal units (Btu), plus fixed increases of 2.5 cents per million Btu on January 1, 1976, and at the end of each six months thereafter.

[9] Attached as Exhibit "E" to El Paso's original petition is a letter, dated October 1, 1974, addressed to Odessa Natural Corporation ("Odessa"), an intrastate pipeline affiliate of El Paso, from Exxon soliciting proposals for the purchase of Exxon's share of natural gas produced after July 14, 1975, from the various lands and leases presently leased to Gulf, *et al.* pursuant to the Waddell lease.

before Warren and Gulf, *et al.* may cease making their current sales for resale in interstate commerce and Southland, *et al.* may sell the gas currently attributable to the Waddell lease to natural gas companies doing business solely intrastate.[10] The purpose of the current proceeding is to resolve these issues.

Southern California Gas Company ("SoCal"), Mobil Oil Corporation ("Mobil"), Southwest Gas Corporation ("Southwest Gas"), the People of the State of California ("California"), Texaco, Inc. ("Texaco"), Exxon Corporation ("Exxon"), Mitchell Ener-

[10] The issues as stated in El Paso's original petition read as follows:

(i) Given the fact that, according to Texas law, a certain 50-year fixed term lease automatically terminates on July 14, 1975, and the mineral rights thereunder revert to the reversionary interest owners, must Gulf Oil Corporation and other lessees under said certain 50-year fixed term lease, who have been selling gas produced from said lease on a percentage-type basis to Warren Petroleum Corporation for resale in interstate commerce, obtain abandonment authorization pursuant to Section 7(b) of the Natural Gas Act ("Act") and Section 154.91 of the Commission's Regulations Under the Natural Gas Act in order to cease such sales to Warren Petroleum Corporation and effectuate the transfer by reversion to Exxon Corporation, Southland Royalty Company, and other reversionary interest owners of the mineral rights under said certain 50-year fixed-term lease?

(ii) Given the facts set forth in (i), without prior Commission authorization, may Exxon Corporation, Southland Royalty Company, and other reversionary interests divert natural gas from its present movement in interstate commerce to delivery and sale in intrastate commerce?

(iii) Given the facts set forth in (i), without prior Commission authorization, may Warren Petroleum Corporation reduce its sales in interstate commerce of residue natural gas to El Paso, the present level of which is attributable in part to production from the lease in question?

gy Corporation ("Mitchell"), Pacific Gas and Electric Company ("PGandE"), Gulf Oil Corporation ("Gulf"), and [274] Mineral Interest Owners filed petitions to intervene in this proceeding.[11] Only Gulf disputed El Paso's statement of facts as set forth in El Paso's petition for issuance of a declaratory order. Gulf in its petition to intervene[12] stated that there is no Warren Petroleum Corporation because Warren Petroleum Corporation has been merged into Gulf and subsequently became Warren Petroleum Company, a division of Gulf, and that there are therefore no sales of the gas in issue between Gulf and Warren. By its answer to Gulf's petition to intervene, El Paso accepted Gulf's clarification of the facts although it did not accept Gulf's conclusions and submitted that Warren Petroleum Company should be substituted for Warren Petroleum Corporation. Therefore, there appears to be no dispute among any of the parties to the instant proceeding as to the material facts.

On April 7, 1975, Texaco filed a Petition for Issuance of a Declaratory Order asking the Commission to resolve the single legal issue of whether a lessee, by making an interstate gas sale, can commit more than its real property interest (*i.e.*, its rights under its lease), thereby both encumbering forever the real estate and imposing upon the nonparticipating min-

[11] Petitions to intervene by SoCal, Mobil, Southwest Gas, California, Texaco, Exxon, Mitchell, PGandE, Gulf, and Mineral Interest Owners were filed on February 6, 1975, February 19, 1975, February 18, 1975, February 25, 1975, February 28, 1975, March 3, 1975, and March 3, 1975, respectively.

[12] Petition to Intervene and Response of Gulf Oil Corporation, Docket No. CP75-209 (filed March 3, 1975.)

eral fee owner the obligations of Section 7 of the Natural Gas Act. This single issue is substantially the same as those issues presented in El Paso's original petition. Texaco's petition involves another 50-year fixed term lease but covering property in Ector County, Texas. This lease was executed on August 7, 1925, between Gulf Production Company, as lessee, and Goldsmith, *et al.*, as lessors, (hereinafter referred to as the "Goldsmith lease")[13] and will expire on August 7, 1975. Texaco is one of the reversionary mineral interest owners under the Goldsmith lease. Upon expiration of the lease on August 7, 1975, the reversionary mineral interest rights thereunder will revert to Texaco and others. Gulf, the current lessee, is selling casinghead gas from this property to Phillips Petroleum Company ("Phillips"). Phillips is currently selling such gas to El Paso at the tailgate of [275] Phillips' Goldsmith Plant pursuant to Phillips' FPC Gas Rate Schedule Nos. 7, 32, 33, 497, and 483.[14]
respectively.

El Paso takes delivery of surplus residue gas into its pipeline system at the outlet at Phillips' Goldsmith Plant and transports it through its jurisdictional fa-

[13] A copy of this lease is attached to Texaco's petition as Exhibit "A".

[14] The Commission granted certificates of public convenience and necessity authorizing the sale of residue gas to El Paso pursuant to Phillips' F.P.C. Gas Rate Schedule Nos. 7, 32, 33, 483, and 497 at Docket No. G-2625, 16 F.P.C. 1440 (1956); Docket No. G-2625, 16 F.P.C. 1440 (1956); Docket No. G-3356, 16 F.P.C. 1442 (1956), amended by order issued June 12, 1961; Docket No. CI71-530 (issued April 23, 1971); and Docket No. CI72-590, 50 F.P.C. 390 (1973), supplemented by order issued July 22, 1974,

cilities for subsequent resale in interstate commerce.[15] El Paso purchases, transports, and resells approximately 103 million cubic feet of such surplus residue gas daily. Approximately 18 million cubic feet daily of such surplus residue gas is attributable to production from wells on land in Ector County leased by Gulf and others pursuant to the Goldsmith lease.

The issues to be resolved under Texaco's petition as restated by El Paso are basically whether Gulf, Phillips or Texaco must file for Commission abandonment authorization pursuant to Section 7(b) of the Natural Gas Act before Phillips and Gulf may cease making their current sales of natural gas for resale in interstate commerce and Texaco as reversionary interest owner may sell the gas currently attributable to the Goldsmith lease to natural gas companies other than Phillips for resale in intrastate commerce.[16]

[15] At the following docket numbers, the Commission granted El Paso certificates of public convenience and necessity for the construction and operation of pipeline and compression facilities through which El Paso transports gas from Phillips' Goldsmith Plant in interstate commerce: G-655, 5 F.P.C. 115 (1946); G-1019, 8 F.P.C. 726 (1949); and G-1051, 7 F.P.C. 908 (1948).

[16] The issues as stated in El Paso's answer to Texaco's petition read as follows:

> (i) Given the fact that, according to Texas law, a certain 50-year fixed term lease automatically terminates on August 7, 1975, and the mineral rights thereunder revert to the reversionary interest owners, must Gulf and any other lessees under a certain 50-year fixed term lease, who have been selling gas produced from said lease on a percentage-of-the-proceeds basis to Phillips for resale in interstate commerce, obtain abandonment authorization pursuant to Section 7(b) of the Natural Gas Act and Section 154.91 of the Commission's Regulations under the Natural Gas Act in order to cease such sales to Phillips and effectuate the transfer by reversion to

[276] On June 3, 1975, the Commission issued an order consolidating these two proceedings for purposes of briefing and decision. Permission to intervene [17] was granted to Exxon, Mineral Interest Owners, Gulf, SoCal, Southwest Gas, Mobil, Texaco, Mitchell, El Paso, Phillips, Northwest, and California.

As stated in its order of June 3, 1975, the issues raised by El Paso's petition to be resolved by the Commission are:

(1) May Southland, *et al.*, divert natural gas from interstate commerce to intrastate commerce without prior permission and approval of the Commission?

(2) Must Gulf, *et al.*, obtain abandonment permission and approval in order to cease sales to Warren and to effectuate a transfer to Southland, *et al.*?

(3) May Warren reduce its sales to El Paso to the extent such sales are attributable to production

Texaco and other reversionary interest owners of mineral rights under said 50-year fixed term lease?

(ii) Given the facts set forth in (i), without prior Commission authorization, may Texaco and other reversionary interest owners divert natural gas from its present movement in interstate commerce to delivery and sale in intrastate commerce?

(iii) Given the facts set forth in (i), without prior Commission authorization, may Phillips reduce its sales in interstate commerce of residue natural gas to El Paso, the present level of which is attributable in part to production from the lease in question?

[17] Petitions to intervene in Docket No. CI75-594 were filed by El Paso, Gulf, Phillips, Mineral Interest Owners, Northwest Pipeline Corporation ("Northwest"), and California.

from the subject leasehold property without prior Commission permission and approval?

[277] The Commission's order of June 3, 1973, also includes the issue as restated by Texaco; that is, whether a lessee by making an interstate gas sale can commit more than its real property interest (*i.e.*, its rights under its lease), thereby both encumbering forever the real estate and imposing upon the nonparticipating mineral fee owner the obligations of Section 7 of the Natural Gas Act.

By said order of June 3, 1973, the Commission ordered that initial briefs on the questions presented in the consolidated proceeding be filed by any party to the proceeding and the Commission Staff on or before June 11, 1975. The date set for reply briefs was June 18, 1975.

On June 5, 1975, in response to a motion to revise the briefing schedule filed by Exxon, the Commission gave notice that the briefing schedule was revised to allow all parties to file simultaneous briefs on June 20, 1975. The date for reply briefs was cancelled. By order issued June 13, 1975, the Commission established a June 25, 1975 filing date for reply briefs.

II.

Statement of the Issues

(i) Given the fact that, according to Texas law, two 50-year fixed term leases automatically terminate on July 14, 1975, and August 7, 1975, respectively, and the mineral rights thereunder revert to the reversionary interest owners, must

Gulf and any other lessees under the certain 50-year fixed term leases, who have been selling gas from said leases on a percentage-of-the-proceeds basis to Warren and Phillips for resale in interstate commerce, obtain abandonment authorization pursuant to Section 7(b) of the Natural Gas Act and Section 154.91 of the Commission's Regulations under the Natural Gas Act in order to cease such sales to Warren and Phillips and effectuate the transfer to Southland, *et al.* and Texaco, respectively, and other reversionary interest owners of mineral rights under said 50-year fixed term leases?

(ii) Given the facts set forth in (i), without prior Commission authorization may Southland, *et al.*, Texaco and other reversionary interest owners divert natural gas from its present movement in interstate commerce to delivery and sale in intrastate commerce?

(iii) Given the facts set forth in (i), without prior Commission authorization, may Warren and Phillips reduce their sales in interstate commerce of residue natural gas to El Paso, the present level of which is attributable in part to production from the leases in question?

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III.

Summary of El Paso's Position

El Paso is of the firm belief that Section 7(b) abandonment authorization is required before the lessees under the two leases (hereinafter included in the reference "Gulf, *et al.*") may cease making sales of cas-

inghead gas to Warren and Phillips and before Warren and Phillips may reduce sales of residue gas to El Paso. The gas produced from acreage covered by these leases has been dedicated to interstate commerce and cannot be withdrawn without prior authorization by the Commission. Furthermore, all the reversionary interest owners under both leases (hereinafter included in the reference "Southland, *et al.*") are bound by the prior dedication of the natural gas produced from acreage which will revert to them upon expiration of the leases. They cannot discontinue sales presently being made for resale in interstate commerce without first obtaining permission of the Commission pursuant to Section 7(b) abandonment procedures. It is El Paso's position that the interest of the public in stability and continuity of service during the present time of critical gas shortages makes the requirement of abandonment authorization in this instance imperative.

IV.

Argument

Section 7(b) of the Act[13] requires that no natural gas company abandon any service rendered by facilities within the jurisdiction of the Commission without

[13] Section 7(b) of the Act provides:

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

the Commission's prior approval. 15 U.S.C. Section 717f(b) (1964). The language of the section is unequivocal, bluntly foreclosing any abandonment, whether justified or not, without this prior authorization. *Farmland Industries* v. *Kansas-Nebraska Natural Gas Co.*, 349 F. Supp. 670, 677 (D. Neb. 1972), *aff'd.* 486 F. 2d [279] 315 (8th Cir. 1973). The jurisdiction of the Commission attaches to sales of natural gas which are destined for resale in interstate commerce. Section 1(b); 15 U.S.C. Section 717(b) (1964). Once natural gas begins to flow in interstate commerce, it thereby becomes dedicated to interstate commerce and Section 7(b) of the Act provides the exclusive means by which the seller of gas may terminate service. *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960).

The purpose of the requirement of Section 7(b) is to protect the interest of the public in the sale of natural gas. *Transcontinental Gas Pipe Line Corp.* v. *FPC*, 488 F.2d 1325 (D.C. Cir. 1963), *cert. denied*, 414 U.S. 921 (1974). This interest is recognized to be greater than and to transcent the interests of individual parties in their own private arrangements. *Id.* It is also because of this overriding public interest that "[a] regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law." U*nited Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 400 (1965)). Thus, *Gulf Oil Corporation* v. *Southland Royalty Co.*, 496 S.W.2d 547 (Tex. 1973) did no more than to decide when the lease held by Gulf and other lessees of the Waddell property would terminate. The holding in that case, that the 50-year fixed term lease automatically terminates on July 14, 1975, at which time the

mineral rights thereunder revert to the reversionary interest owners, in no way affects the necessity for Commission abandonment authorization pursuant to Section 7(b) before sales of the gas to the present purchasers may cease. It is undisputed that upon termination of the lease at least some of the reversionary interest owners have arranged to sell natural gas previously dedicated to interstate commerce intrastate purchasers. Such an action is precisely what the Natural Gas Act has proscribed if accomplished without prior Commission authorization.

I. Gulf, *et al.* may not terminate their sales of natural gas without first obtaining abandonment authorization form the Commission.

A. The issue has not previously been adjudicated.

It should first be noted that the issue of whether a lessee, selling natural gas in interstate commerce from wells held under a fixed term lease, must obtain Commission authorization pursuant to Section 7(b) of the Natural Gas Act to terminate such sales upon the expiration of the lease, has not previously been adjudicated. As indicated above, *Gulf Oil Corp.* v. *Southland Royalty Co., supra,* did not consider this issue in its determination of when the lease in question terminates.

Furthermore, no other case appears to have dealt squarely with this point. Of particular note is *El Paso Natural Gas Co.* v. *Perry R. Bass,* 48 F.P.C. 1269 (1972). This case dealt with the issue of whether a producer, who obtained reconveyance of a fractional working interest pursuant to a farmout agreement,

was free to divert all of the gas, [280] previously sold by the farmoutee to a natural gas company for resale in interstate commerce, to another company, also for resale in interstate commerce, without Section 7(b) authorization. The Commission held that the producer's prior royalty interest did not make him a seller of natural gas in interstate commerce for resale nor did his conversion from a royalty interest to a working interest; therefore, the producer was free to sell his share of gas as he wished without abandonment authorization. However, nowhere in the opinion does the Commission indicate that the farmoutee, a prior working interest owner as are Gulf, *et al.*, was also free to cease sales of natural gas, which it had previously dedicated to interstate commerce, without first going through the required Section 7(b) procedures.[19]

B. Gulf, *et al.*'s sales of casinghead gas and gas well gas are sales of natural gas in interstate commerce for resale as defined by the Natural Gas Act.

The jurisdiction of the Commission extends to those "natural-gas companies" which are "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. Section 717a (1964). Prior to abandonment of those facilities and services which come within the jurisdiction of the Commission, Section 7

[19] In fact, Shell Oil Co. ("Shell"), the farmoutee in Bass, was required to and did file a notice of partial cancellation of its rate schedule to reflect Bass' conversion of his overriding royalty interest to a one-half working interest. The Commission granted Shell's request for partial cancellation.

(b) authorization must be obtained. 15 U.S.C. Section 717f. The lessees in the instant case are "natural-gas companies" within the meaning of the Act and their sales of casinghead gas are within the jurisdiction of the Federal Power Commission.

The sales by the lessees of natural gas[20] are "sale(s) in interstate commerce of such gas for resale." The fact that the gas sold at the wellhead is not committed on its interstate journey until some point after the original sales take place is irrelevant as long as the gas is ultimately delivered in interstate commerce. *Continental Oil Company* v. *FPC,* 247 F.2d 904 (5th Cir. 1957). Admittedly, gas sold by [281] Gulf, *et al.* ultimately enters El Paso's interstate pipelines.[21] On facts similar to those in the present situation the court in *Deep South Oil Co.* v. *FPC, supra,* determined that where gas produced from seller's wells, at least in part, was resold to consumers outside the state, seller was making "sales for resale" within the meaning of the Natural Gas Act, notwithstanding the fact that such gas, in the course of the interstate transmission, passed through a local processing plant. By virtue of the fact that the gas from seller's wells continuously flowed into

[20] "Casinghead gas" is "natural gas" within the meaning of the Natural Gas Act. 15 U.S.C. Section 717a; Deep South Oil Co. of Tex. v. FPC, 247 F.2d 882 (5th Cir. 1957), *cert. denied,* 335 U.S. 930 (1958).

[21] The further fact that the gas sold by Gulf, *et al.* may be used primarily for the manufacturing of gasoline does not bring the transaction outside the jurisdiction of the Commission, for the fact that some of the gas sold by the lessees is resold and eventually crosses interstate lines brings the entire sale within the auspices of the Commission. Shell Oil Co. v. FPC, 247 F.2d 900 (5th Cir. 1957).

a gathering system and became part of a mass of gas which moved continuously from the gathering system into a processing plant, and from the outlet of such plant to interstate destinations, sales at and from the outlet of such plant to interstate destinations, sales at the well were also sales in "interstate commerce" within the meaning of the Natural Gas Act. *Id.* The fact that the residue gas actually moving in interstate commerce may be of small volume in relation to the totality of gas purchased by El Paso does not affect the interstate nature of the entire sale. "The Commission's jurisdiction attaches to interstate sales of any size." *Warren Petroleum Corp.* v. *Sun Oil Co.*, 48 F.P.C. 881, 886 (1972). *See Harper Oil Co.* v. *FPC*, 284 F.2d 137 (10th Cir. 1960). It is the actual physical movement of the gas in interstate commerce along with its eventual resale which are the important criteria in determining Commission jurisdiction. *See People of the State of California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965).

C. The termination of the leases under which Gulf, *et al.* have operated wells and sold natural gas therefrom for resale in interstate commerce does not eliminate the need to obtain abandonment authorization prior to cessation of such sales.

"The principle is well established that dedication of reserves for sale in interstate commerce occurs at least as soon as deliveries commence, and that once service is begun, the producer cannot terminate the service without Commission approval." *Cumberland Natural Gas Co.*, 34 F.P.C. 132, 136 (1965). The key term is "service" and the Commission has "long

drawn a distinction between the underlying service to the public a natural gas company performs and the specific manifestation . . . which that service takes at a given moment." *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 152 (1960). As early as 1942 the Commission held that the continuing obligation to perform "service" imposed by the Act outlasts the term of a seller's original contract of sale so that [282] abandonment of service after the expiration of such contract had to have Commission approval under Section 7(b). *United Gas Pipe Line Co.*, 3 F.P.C. 3, 9 (1942), *cited in, Sunray Mid-Continent Oil Co.* v. *FPC, supra.*

A lease is merely another manifestation of a private relationship which cannot be allowed to interfere with the duty of continuing service imposed by the Natural Gas Act. *Bill J. Graham, et al.*, Docket No. CI75-626, *et al.*, —— F.P.C. —— (issued June 16, 1975). It is the initial volitional decision to purchase and sell which subjects seller and buyer to duties transcending personal contractual or other arrangements. *United Gas Pipe Line Co.* v. *FPC*, 350 F.2d 689, 694 (5th Cir. 1965), *aff'd.* 385 U.S. 83 (1966). As pointed out by the court in *Hunt* v. *FPC*, 306 F.2d 334, 342 (5th Cir. 1962), *rev'd on other grounds,* 376 U.S. 515 (1964), the rights of a seller of natural gas may be temporary, but his duties are not. The dedication of natural gas to interstate commerce is *in rem* rather than *in personam* and thus, "[l]ike the ancient covenant running with the land, the duty to continue to deliver and sell flows with the gas from the moment of the first delivery down to the exhaustion of the reserve, or until the Commission on appropriate terms,

permits cessation of service under Section 7(b), 15 U.S.C. Section 717f (b)." *Id.* Without the proper authorization, service must continue even if this might place a hardship on the seller or give the buyer an "undue preference or advantage." ***Farmland Industries*** v. ***Kansas-Nebraska Natural Gas Co.***, 349 F. Supp. 670, 677 (D. Neb. 1972), *aff'd.* 486 F.2d 315 (8th Cir. 1973); *see also Harper Oil Co.* v. ***FPC, supra.***

The lessees have dedicated the natural gas produced by their wells to interstate commerce. They have brought themselves within the jurisdiction of the Federal Power Commission and thus may not cease making sales of the gas from these wells without abandonment authorization.[22] Regardless of the termination of the lease, service must continue.

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[22] Section 154.91 of the Commission's Regulations under the Act states that natural gas producers which make sales on a percentage of the proceeds basis of natural gas to processing plant operators are subject to the requirements of Section 7(b) of the natural gas act. As noted above, lessees here make percentage sales to Warren and Phillips. Therefore, they must comply with Section 7(b) before they can abandon this service. Section 154.91 states:

> (e) *Percentage sales.* Where a producer sells to the operator of a processing plant at a price which is a percentage of the proceeds from the resale of residue gas, the plant operator shall make all filings required to cover the sale by such producers, which filings shall include a list of the producers from whom the natural gas is purchased, showing the per centum of the resale price received by each from such sales of gas. At the close of each calendar year or at the end of each twelve-month period following the date of initial filing the operator shall submit a further statement listing any changes in the producers from whom the gas is purchased or in the per centum they receive. In cases of percentage sales by producers covered by this paragraph, the producers may not file rate schedules, rate changes, or certificate applications, whether or

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II. Warren and Phillips may not reduce their sales in interstate commerce of residue natural gas to El Uaso, the present level of which is attribuable in large part to production from the leases in question, without prior Commission abandonment authorization.

A. This issue was not settled by *Gulf* v. *Southland Royalty.*

As with the lessees, the duties of Warren and Phillips to continue their present level of sale of natural gas in interstate commerce for resale was not settled wih the decision of the Supreme Court of Texas in *Gulf Oil Corp.* v. *Southland Royalty Co., supra.* The Supreme Court of Texas decided only that the Waddell lease will automatically terminate on July 14, 1975. The Supreme Court of Texas did not decide that the continuing duty to sell gas covered by the Waddell lease shall also automatically terminate on July 14, 1975.

B. Warren's and Phillips' sales of residue gas come within the jurisdiction of the Commission.

Warren and Phillips have for several years been selling large quantities of residue natural gas to El Paso whereupon it enters El Paso's interstate system to be resold in interstate commerce. There can be no

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not the filings by operator as herein required have been made. However, such producer is fully subject to applicable provisions of the Natural Gas Act, including sections 5 and 7(b).

doubt then that Warren and Phillips are natural gas companies within the meaning of the Act and that these sales to El Paso are likewise jurisdictional. *See People of the State of California* v. *Lo-Vaca Gathering Co., supra;* 15 U.S.C. Section 717(b) (1964).

[284]

C. Warren and Phillips must obtain abandonment authorization in order to reduce sales of natural gas which have been dedicated to interstate commerce.

A reduction in the quantity of natural gas delivered is an abandonment of service. *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.,* 177 F.2d 942 (6th Cir. 1949); *Dixie Pipe Line Co.,* 14 F.P.C. 106 (1955). If Warren and Phillips are allowed to cease selling to El Paso residue gas attributable to the leases in question the reduction will indeed be substantial. Sales from Warren alone will be reduced nearly one-half. (Approximately 25 million cubic feet per day of the 60 million cubic feet per day of surplus residue gas which El Paso purchases at the tailgate of the Waddell Plant reflects gas production attributable to Gulf's leasehold estate under the Waddell lease.) This residue gas is natural gas which has been dedicated to interstate commerce by the sale to and transportation by El Paso in interstate commerce.

The sale of this natural gas may be abandoned only upon proper Commission authorization. *Sunray Mid-Continent Oil Co.* v. *FPC, supra.* Warren and Phillips have a duty to continue this service. *Id.* Their duty cannot be abrogated by either the termination

of the lessees' leasehold interests or any sales contracts between Gulf, *et al.* and either Warren or Phillips. *See United Gas Pipe Line Co.* v. *FPC, supra.*

Neither can the nature of Warren's and Phillips' contracts with El Paso, which are for the sale of surplus residue gas, limit the duty they have to continue selling gas which they have dedicated to interstate commerce. It is the actual physical movement of the gas across state lines which is determinative. Once natural gas has become jurisdictional it cannot cease to be so as the result of either prior or subsequent agreements between the parties. *People of the State of California* v. *Lo-Vaca Gathering Co., supra.* "The service . . . is distinct from the contract." *Sunray Mid-Continent Oil Co.* v. *FPC, supra.* Just as service must continue past the expiration of the sales contract, so too, once dedication has occurred, must the level of service continue despite the terms of any specific contract.

El Paso does not contend that mere fluctuations in the amounts of surplus residue gas sold by Warren and Phillips to El Paso require abandonment authoribation. However, El Paso does contend that a permanent reduction in sales by Warren and Phillips of natural gas presently flowing in interstate commerce does require abandonment authorization. The diversion of natural gas produced from the Waddell and Goldsmith leases upon the termination of those leases will result in a permanent reduction in the sales of gas by Warren and Phillips to El Paso.

III. Southland, *et al.* must obtain abandonment authorization in order to discontinue sales of natural gas dedicated to interstate commerce by Gulf, *et al.*

[285]

A. *El Paso Natural Gas Co.* v. *Perry R. Bass* must be confined to its facts.

As indicated above, in *Perry R. Bass, supra,* a producer (*i.e.* Bass) pursuant to terms of a farmout agreement with Shell exercised his option to convert his overriding royalty interest into a 50 percent working interest. Although Shell had been selling all of the natural gas produced from a well to El Paso for resale in interstate commerce, the producer, after converting his overriding royalty interest into a working interest, sought to sell his 50 percent share of the production to Natural Gas Pipe Line Company ("Natural") also for resale in interstate commerce. The Commission held that Bass was free to sell his shares of gas to Natural without first obtaining abandonment authorization since neither his prior royalty interest nor his conversion from a royalty interest to a working interest made him a seller of natural gas in interstate commerce.

Factually, the situation in *Bass* was quite different from the one under present consideration. In this case, the entire output of the wells is proposed to be diverted to intrastate commerce whereas in *Bass* the producer merely chose to sell to another interstate pipeline company for resale in interstate commerce. Furthermore, Bass and Shell executed an agreement specifically prohibiting Shell from disposing of Bass'

share of the gas. Apparently no such agreement was executed between Gulf, *et al.*, the lessees, and Southland, *et al.*, the reversionary interest owners.

Most important, however, is the difference in the instruments by which the respective parties obtained their interests. The arrangement the parties used in *Bass* was the farmout agreement. In supporting its decision in *Bass,* the Commission heavily stressed that "[f]armouts serve the public interest, for they are a means whereby an available drilling site is placed with a person having available risk capital to the end that the site is explored. Without farmout arrangements, exploration will be limited, for exploration would then occur only when there is a coincidence of site availability and exploration risk capital in one producer." *Id.* at 1277. The Commission felt that if abandonment authorization was required of the producer, "[t]he future use of farmout agreements in the natural gas producing industry would be discouraged," a result "clearly contrary to the public interest." *Id.* at 1278.

However, the instrument involved in this case, the fixed term lease, does not particularly serve the public interest. In fact, on page 5 of the Petition to Intervene and Answer of Mineral Interest Owners to Petition for Declaratory Order filed herein, these reversionary interest owners point out that "[s]uch term oil and gas leases now are extremely rare, in fact almost unique . . . and . . . 'of no practical importance' in Texas. Walker, *The Nature of Property Interests Created by an Oil Gas Lease in Texas,* 7 Tex. L. Rev. 1, 15 (1928)." [286] Thus it is unlikely that requiring abandonment authorization in this instance would pose a threat to the public interest.

For these reasons it is urged that the holding in *Bass* be limited to the factual situation presented in that proceeding. The stated goals of the Commission in *Bass* were "to regulate through application of the Act in such manner as to encourage exploration, development, and dedication of natural gas to the interstate market." *Id.* at 1277. Because of the factual distinctions between *Bass* and the instant proceeding, these goals can only be furthered in the present situation by *requiring* abandonment authorization.

B. The reversionary interest owners are bound by the prior dedication of the gas reserves to interstate commerce.

As the court in *Mobil Oil Corp.* v. *FPC,* 463 F.2d 256, 260 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 976 (1972) pointed out, "the lease term gives the lessee all possessory interests in gas produced during the life of the lease, including full right of sale." As a result of their sales of casinghead gas, some of which is eventually resold in interstate commerce, Gulf, *et al.* dedicated all of the gas produced from their leasehold interest to interstate commerce. A gas flow, once jurisdictional, remains so until abandonment is permitted. *Sunray Mid-Continent Oil Co.* v. *FPC, supra.* This is so even though ownership of the gas may pass into the hands of successors in interest. *See Cumberland Natural Gas Co.,* 34 F.P.C. 132 (1965).

"Each successor, by stepping into the shoes of his predecessor, takes the properties and sales subject to any benefits or infirmities inherent therein." *Graridge Corp.,* 30 F.P.C. 1156 (1963). Until termination of the lease, Gulf, *et al.* are in possession of the entire

interest in the natural gas produced. Upon termination, the reversionary interest owners will succeed to this interest. They must take this interest subject to the prior dedication of the gas by the lessees.

It is not always the case that a particular producer must himself choose to sell gas in interstate commerce and commence deliveries to come within the Commission's jurisdiction. This point is well illustrated by the recent Commission decision in *Blair-Vreeland*, Op. No. 724, —— F.P.C. ——, (issued March 18, 1975). John B. Vreeland doing business as Blair-Vreeland ("Vreeland") had entered into a farmout agreement with Exxon covering 480 acres of land in Duval County, Texas. He proceeded to drill two wells whereupon he was advised by the Tennessee Gas Pipe Line Company ("Tennessee") that the gas from these wells had been dedicated to interstate commerce as a result of sales to Tennessee by Exxon, Vreeland's predecessor in interest. Vreeland contracted to sell the gas from both wells to the Lo-Vaca Gathering Company for resale in intrastate commerce. The Commission found that the gas from these wells had been dedicated to Tennessee as a result of its contract with [287] Exxon and that Vreeland was bound by this previous dedication. Even though Vreeland had not himself made sales of natural gas in interstate commerce for resale, the Commission, by instead looking at the prior history of the acreage and reservoirs involved, held that Vreeland as successor in interest could not withdraw any portion of dedicated and certificated acreage from the dedication. The important factor was the actual flow of gas in interstate commerce rather than in whom ownership was vested at the moment. Vreeland

had never been a "willing seller" in interstate commerce yet he could only attempt to avoid the prior dedication of gas from his wells by means of Section 7(b) abandonment procedures.

On June 11, 1975, the Commission issued a decision, *Mitchell Energy Co.*, Op. No. 733, —— F.P.C. —— (hereinafter cited as *Mitchell*), which further supports its holding in *Blair-Vreeland, supra.* The Commission in *Mitchell* held that the assignment of an interest in a gas producing field could not defeat the fact that all of the natural gas therefrom had previously been dedicated to interstate commerce. The assignee was held duty bound to continue service even after the expiration of the assignor's sales contract which assignee had assumed. This was true whether the gas was produced from the new wells drilled by the assignee or from those developed by his predecessor in interest.

The fact of dedication "from all available reserves" was determined from a 1949 sales contract between assignor Gray Wolfe and Tennessee Gas Pipeline Co. Even though Mitchell had not itself made sales to Tennessee, the Commission looked to the history of the properties involved to find that Mitchell was bound by the prior dedication. In summarizing its position the Commission stated,

> ". . . what is controlling is the service that Gray Wolfe was rendering. This does not depend on the continuation of the original sales contract of 1949, but the contract serves to indicate the type of service that was to be rendered and which was certificated by the Commission. Here the contract

> plainly included all gas produced from Gray Wolfe's interests in the Pinehurst Field. Gray Wolfe was required to render that service and to continue rendering that service. . . . Therefore all sales made or to be made by Mitchell from the Gray Wolfe reserves in the Pinehurst Field are subject or will be subject to the Commission's jurisdiction and Mitchell must continue to sell such gas in interstate commerce until relieved by action of the Commission under Section 7(b) of the Natural Gas Act." *Id.* at 6.

Likewise, the reversionary interest owners in this case must obtain abandonment authorization before they may cease sales of natural gas from reserves dedicated to interstate commerce by Gulf, *et al.* As long as the lessees have not obtained abandonment authorization they are [288] required to continue rendering their service of selling natural gas for resale in interstate commerce. Southland, *et al.* take their interest subject to this duty since the gas reserves in issue are already under the Commission's jurisdiction and will remain so until abandonment is authorized.

IV. The public interest requires that abandonment authorization be obtained before sales the current purchaser may cease.

"The proscription of abandonment without prior Commission approval was designed to ensure stability and continuity of service." *Farmland Industries* v. *Kansas-Nebraska Natural Gas Co., supra* at 680. As concern over the present "energy crisis" becomes more and more acute, these goals become increasingly im-

portant. To hold that abandonment authorization is not required in this instance would be to "shift from the governmental agency to a private interested party the determination of this critical problem of the needs of the public, not alone for today, but for the explosive tomorrow." *United Gas Pipe Line Co.* v. *FPC, supra* at 697.

One goal of the Act is to allow competing interests to come forward in a hearing before the Commission to enable the Commission to arrive at a decision as to whether an abandonment would be in the public interest. In *Transcontinental Gas Pipe Line Gas Corp.* v. *FPC,* 488 F.2d 1325 (D.C. Cir. 1973), *cert. denied,* 417 U.S. 921 (1974) (hereinafter cited as *La Gloria Field*) the court held that since "the public interest is the ultimate criterion under Section 7(b)," the Commission must afford a full comparative needs hearing regardless of any contractual arrangements entered into by the parties involved.

La Gloria Field involved two pipeline companies, Transcontinental Gas Pipe Line Corporation ("Transco") and Natural Gas Pipeline Company of America ("Natural") which were engaged in the transportation and sale of natural gas in interstate commerce. Both companies purchased their gas from La Gloria Field producers. Upon discovering that they could not continue to meet the requirements of both companies and still have adequate gas for other needs, the producers entered into an agreement with Natural, which was approved by the Commission, providing for a substantial reduction in deliveries to Natural until its contract expired. In return, the producers agreed to dedicate all the natural gas reserves in the La Gloria

Field to Natural and to seek abandonment of all deliveries to Transco when its contract expired.

At the termination of Transco's contract, abandonment proceedings were instigated and the Commission approved abandonment, according dispositive weight to the private contractual arrangement absent a showing of countervailing "unequivocal public necessity." *Id.* at 1329. The court held that such rigid deferral to a contractual arrangement was "an inadequate means to assure vindication of the transcendent [289] interests of the public." *Id.* The case was remanded to the Commission for further proceedings so that the comparative needs standard enunciated by the court in *Michigan Consolidated Gas Co.* v. *FPC,* 283 F.2d 204 (D.C. Cir. 1960), *cert. denied,* 364 U.S. 913 (1960), could be applied. The court in *Michigan Consolidated* established the fundamental principle that all factors relevant to the determination of which course of action best promotes the overall public interest must be fully considered, giving primary importance to a comparison of the needs of the competing natural gas systems and the public markets they serve. *Id.* at 214. The Commission should also take into consideration "economic effect on the pipelines and their consumers, the presumption in favor of continued service and the relative diligence of the pipelines in providing for adequate natural gas supplies." *La Gloria Field, supra* at 1330.

The important public interest considerations which were stressed by the court in both *Lo Gloria Field* and *Michigan Consolidated* can only be developed during the course of an abandonment authorization proceeding as set forth in Section 7(b) of the Act and

the corresponding regulations. "Once facilities are placed into operation under authority of the Natural Gas Act, justifiable public reliance attaches to their continued operation under Section 7(b), for public rights and responsibilities arise upon the dedication of facilities to the public use and these rights cannot be protected nor these responsibilities acquitted by the individual natural gas companies." *Continental Oil Co.* v. *United Gas Pipe Line,* 31 F.P.C. 1079, 1081 (1964), *aff'd.* 350 F.2d 689 (5th Cir. 1965), *aff'd.* 385 U.S. 83 (1966). To ensure that there is no betrayal of "justifiable public reliance" nor an abdication of responsibility, it is essential that the Commission require abandonment proceeding prior to the cessation of sales of natural gas which enter El Paso's interstate pipelines. It is especially important that little used, impractical instruments such as the fixed term leases in question not be allowed to defeat the goals of Section 7(b).

V.

Conclusion

Wherefore, for the foregoing reasons, El Paso Natural Gas Company respectfully requests that the Commission hold that sales of natural gas presently being sold for resale in interstate commerce may not cease as the result of the termination of two 50-year fixed term leases without prior Commission authorization pursuant to Section 7(b) of the Natural Gas Act. El Paso respectfully requests that the Commission hold that, before current sales may cease and the natural gas diverted to intrastate commerce, such authorization must be sought and obtained by (i) Gulf, *et al.*

as lessees under said leases and currently sellers of natural gas produced therefrom for resale in interstate commerce, (ii) Warren and Phillips as sellers of residue natural gas to El Paso for resale in interstate commerce, and (iii) Southland, *et al.* [290] as reversionary mineral interest owners who, upon termination of the leases in question, will have full rights to the natural gas in issue.

Respectfully submitted,

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(VERIFICATION OMITTED IN PRINTING)

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(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CP75-209, *et al.*

EL PASO NATURAL GAS COMPANY, ET AL.

(FILED JUNE 20, 1975)

Initial Brief of Exxon Corporation

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[294]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CP75-209, *et al.*

EL PASO NATURAL GAS COMPANY, ET AL.

Initial Brief of Exxon Corporation

I

INTRODUCTION

These consolidated proceedings involve petitions by El Paso Natural Gas Company (El Paso) and Texaco Inc. (Texaco) for a declaratory order to determine whether either the mineral fee owners or their lessees must obtain abandonment authorization upon the expiration of certain 50-year fixed term oil and gas leases as a result of the lessees' sales in interstate commerce for resale of production from the leasehold estates during the lease terms.[1] Since Exxon Corporation (Exxon) is one of the mineral fee owners to which El Paso's petition relates, this brief will be

[1] In Texaco's petition, it is requested that the declaratory order also determine whether the processor, which purchases the lessee's production under a percentage arrangement and resells the gas in interstate commerce, must obtain abandonment authority upon expiration of the lease term. While this question was initially presented by El Paso's petition, it was subsequently pointed out by the lessee, and agreed to by El Paso, that the processor is a corporate division of the lessee. As a result there is no sale by the lessee to the processor for which abandonment authority might be required. Consequently, El Paso's petition is limited to the questions of the need for abandonment authority by the mineral fee owners and the lessee.

limited to the issues presented by El Paso's petition. Exxon has never sold or delivered any production from its mineral fee estate to El Paso and Exxon has no contractual obligation to do so. In no sense has Exxon dedicated its property to interstate commerce. Accordingly, Exxon denies that it requires abandonment authorization upon the expiration of the 50-year fixed lease term. To conclude otherwise would deny Exxon the full enjoyment of its mineral fee estate at lease expiration and thus deprive it of its property without due process of law in violation of the Fifth Amendment to the Constitution. Also, as we shall show later, the lessee, Gulf Oil Corporation (Gulf), is not required to secure [295] abandonment authorization regarding production from the mineral fee estate.

II

FACTUAL AND PROCEDURAL SUMMARY

On January 20, 1975, El Paso filed its petition in Docket No. CP75-209 requesting the issuance of a declaratory order regarding a 50-year fixed term oil and gas lease between Gulf and certain mineral fee owners, dated July 14, 1925, as amended March 16, 1926.[2] By such lease, the mineral fee owners granted Gulf the right for a fixed term of 50 years to explore and develop the minerals underlying certain properties located in Crane County, Texas. Pursuant and subject to its specifically limited lease authority, Gulf developed, *inter alia,* natural gas production and arranged

[2] Copies of the lease and amendment are appended to El Paso's petition for a declaratory order. The original lease, as amended, is between Gulf and Waddell, *et al.* Exxon subsequently succeeded to a portion of the mineral fee interests of Waddell, *et al.*

to sell it to El Paso. The sale of the gas produced by Gulf is made to El Paso at the outlet of the Waddell Plant located in Crane County pursuant to two surplus residue gas sales contracts dated January 26, 1951, and March 1, 1972.[3]

On July 14, 1975, the 50-year fixed term oil and gas lease expires by its own terms and Gulf's leasehold estate in the mineral rights is extinguished. The expiration of the lease and the concomitant extinguishment of Gulf's leasehold estate on that date has been conclusively decided by the Supreme Court of Texas in *Gulf Oil Corp.* v. *Southland Royalty Co.*, 496 S.W. 2d 547 (1973). With the termination of the lease on July 14, 1975, Gulf will, by operation of law, no longer have any right to sell gas production from the properties that were subject to the lease. Instead, that right will belong exclusively to Exxon and the other mineral fee owners. Neither Exxon, nor the other mineral fee owners, has contracted to sell its gas to El Paso. In its petition, El Paso questions whether Exxon and the other mineral fee owners and Gulf each have to obtain Commission authority to abandon the delivery of gas to it upon expiration of the lease. In effect, El Paso seeks to acquire that which it has no contractual right to purchase and which has never been dedicated to it.

[296] On February 7, 1975, the Commission gave notice of El Paso's petition for a declaratory order.

[3] According to Gulf's Petition to Intervene and Response in these proceedings these two contracts and their related Commission certificate authorizations are currently in the name of its affiliate, Warren Petroleum Company, a Division of Gulf Oil Corporation (Warren). Since Warren is a division of Gulf there is no sale prior to the delivery of the gas to El Paso.

Thereafter, Exxon, the other mineral fee owners, and Gulf each filed on or about March 3, 1975, their respective answers to El Paso's petition denying that abandonment authority is required by any of them upon lease expiration.

On April 8, 1975, Texaco filed its petition for a declaratory order in Docket No. CI75-594. According to its petition, Texaco is a mineral fee owner under another 50-year fixed term oil and gas lease with Gulf involving properties in Ector County, Texas. The gas produced from the leased properties is sold by Gulf to Phillips Petroleum Company which processes such production in its Goldsmith Plant prior to reselling it to El Paso. Unlike El Paso, Texaco maintains in its petition that no abandonment authority is required at the expiration of its 50-year fixed term lease in August, 1975.

By order issued June 3, 1975, the Commission consolidated the El Paso and Texaco petitions for determination.[4] No hearing was deemed to be required. Instead, the parties are each required to file simultaneous

[4] The Commission's June 3, 1975, order correctly recites that El Paso's petition originally questioned whether Exxon, the other mineral fee owners, and Gulf, and Warren each had to obtain abandonment authority upon expiration of the 50-year fixed term lease. However, as noted at footnote 1, *supra*, El Paso later withdrew its question as to whether Gulf required abandonment authority for a percentage sale to Warren since, in fact, no sale between the corporate affiliates exists. Accordingly, Exxon does not propose to address itself to this question in this brief. However, even if such a sale did exist, no authority would be required for the reasons set forth in its March 3, 1975, Answer in these these proceedings.

initial briefs on June 20, 1975, with simultaneous reply briefs due June 25, 1975.

III

Argument

A. *A Commission Order Requiring Exxon To Deliver Production From Its Mineral Fee Estate To El Paso Would Violate Exxon's Fifth Amendment Rights.*

When the 50-year fixed term oil and gas lease expires on July 14, 1975, the right to dispose of production from the mineral estate vests in Exxon, as mineral fee owner, unencumbered by any contractual commitment to El Paso. Such lease grants no authority to Gulf, as lessee, to commit production [297] after the lease term expires. Accordingly, when El Paso contracted with Gulf to purchase production from Gulf's leasehold estate, it did so subject to Gulf's authority to sell such production as circumscribed by the lease. Just as Gulf's right to sell production ceases when the lease expires, so also does El Paso's right to purchase such production cease when the lease expires. Since Exxon itself has not delivered or agreed to deliver any production from its mineral fee estate to El Paso, Exxon has no duty to El Paso and El Paso has no right as to Exxon with respect to such production when the lease expires on July 14, 1975.

Nevertheless, El Paso, through the guise of suggesting that Exxon or Gulf may require abandonment authority upon lease expiration, seeks to acquire production from Exxon when it has absolutely no right to make such purchase. In the succeeding subsections

of this brief we demonstrate that El Paso's contrived abandonment theories are totally without merit. But before proceeding with such demonstration, a much more fundamental Constitutional issue which underlies El Paso's entire thesis must be recognized. Such issue, when properly understood, dictates that the abandonment order sought by El Paso must be denied.

The abandonment orders sought by El Paso would deprive Exxon of its property without due process of law in violation of the Fifth Amendment of the Constitution. Exxon has no obligation to sell or deliver production from its mineral fee estate to El Paso or to anyone else. It has never delivered, nor agreed to deliver, any of its production to El Paso.[5] Nevertheless, the relief requested by El Paso would force Exxon's delivery of its production to El Paso by precluding the delivery of such production to anyone else, including Exxon itself. Thus, it would deny Exxon its right to determine freely the disposition of its production. Clearly, a Commission order that would require Exxon to sell and deliver its production to El Paso involuntarily would deprive Exxon of its property in such gas in violation of its Fifth Amendment rights.

[298] The mineral fee owner's fundamental Constitutional right to determine initially whether it will

[5] Moreover, Exxon cannot be deemed to have agreed to such deliveries by reason of its agreement to lease its properties to Gulf. As found by the Court in Mobil Oil Corp. v. FPC, 463 F.2d 256, 262 (D.C. Cir. 1972), cert. denied 406 U.S. 976 (1972) the lessor, when it agrees to the lease of the mineral rights, has no knowledge whether gas will be discovered, much less whether gas, if discovered, will be sold or delivered in interstate commerce. Clearly, Exxon may not be found to have constructively acquiesed in a sale to El Paso by reason of the lease to Gulf.

embark upon a sale that will result in it and its property being subject to the Commission's jurisdiction forms the basis for the many judicial decisions which delineate and limit the Commission's authority under the Natural Gas Act. The right to agree to a sale was most succinctly stated by the Fifth Circuit in *Southern Louisiana Area Rate Cases,* 428 F.2d 407 (1970) *cert. denied* 400 U.S. 950 (1970) where the Court found (at p. 428):

> "The producers have a fifth amendment right not to be forced to sell or surrender their property without either due process or just compensation, but the Constitution gives them no right to raise prices irrespective of Commission approval in the absence of a deprivation of property."

Similarly, in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332, 338-339 (1956) the Supreme Court held that under the Natural Gas Act relations between parties are established initially by the contracts to which they voluntarily agree, and the Commission is empowered only to supervise those contracts for the protection of the public interest. Moreover, the Commission cannot require a producer to sell its gas to a user that the Commission favors, *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 365 U.S. 1, 17 (1961), nor can the Commission require a producer "to dedicate its gas to interstate commerce," *Public Service Commission of N.Y.* v. *FPC,* 463 F.2d 824, 829 (1972). Clearly, the Commission is without authority to require Exxon to deliver any production from its mineral fee estate to El Paso because, were it to do so, it would deprive Exxon of its property without due

process of law in violation of the Fifth Amendment to the Constitution.

Although Exxon is a jurisdictional natural gas company because it makes numerous other sales of natural gas in interstate commerce for resale, it is not so situated insofar as production from its mineral fee estate is concerned. Exxon has neither sold nor dedicated such gas to interstate commerce. However, if the relief requested by El Paso were granted, Exxon would be forced to become a jurisdictional company as to such production because such order would compel Exxon to perform involuntarily the threshold jurisdictional act of commencing deliveries in interstate commerce. Under such circumstances, the issuance of such an order to Exxon would be no different from the Commission issuing an order to a widget company that has just acquired some new natural [299] gas reserves directing it to sell its production from such reserves in interstate commerce. Congress simply has not vested the Commission with the power to take private property for a public use.

The fact the Commission order sought by El Paso would force Exxon to initiate a jurisdictional sale readily distinguishes this case from the traditional Constitutional decisions which uphold the imposition of economic regulation under the Commerce power despite the fact that such regulation may reduce the value of the regulated property, *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 59 (1944); *Nebbia* v. *New York,* 291 U.S. 502 (1934). In those cases, the parties themselves voluntarily agreed to the sale which subjected their property to regulation. No such agreement exists here. Thus,

the traditional Constitutional cases which approve economic regulation after a sale has been voluntarily made have no application here. Under these circumstances, El Paso's petitioned relief must be denied if Exxon's Fifth Amendment rights are not to be violated.

B. *The Mineral Fee Owners Are Not Required To Obtain Abandonment Authority.*

We turn now to the two specific questions raised by El Paso's petition which are summarized in the Commission's June 3, 1975, order. First, it is questioned whether Exxon and the other mineral fee owners require abandonment authority at the end of the lease term in order to dispose of their fee interests in the gas to others than El Paso. This question assumes implicitly a critical fact that simply does not exist. Before any question of a need for abandonment authority can arise, there must first have been a sale of gas by Exxon and the other mineral fee owners to be abandoned. Here, however, Exxon and the other mineral fee owners are expressly precluded by their lease with Gulf from making any sales of gas from their mineral estate during the 50-year fixed lease term. During such period, the exclusive right to sell production from the leased properties lies with Gulf. Therefore, prior to July 14, 1975, when the lease expires, Exxon and the other mineral fee owners have not sold, because they could not sell, any gas from the leased properties to El Paso. Notably, even El Paso does not allege that it has purchased any gas from Exxon and the other mineral interest owners. Consequently, there has been no sale or service by or between these parties

to which the Commission's abandonment jurisdiction may apply.

[300] The fact that Exxon and the other mineral fee owners, as royalty owners during the term of the 50-year lease, make no sales subject to the Commission's jurisdiction has been conclusively determined in *Mobil, supra*. There the D.C. Circuit held that (463 F.2d at 262):

> "As to leases of reserves from landowners to lessee-producers there is no knowledge when the lease is executed of the ultimate destination of any gas that might be discovered, no knowledge whether the gas, if discovered, will be sold either to an interstate pipeline or to any other customer that will move it across state lines. While the lease by the landowner provides for a royalty in the event of the discovery and sale of gas, typically he has no control over any incident of such sale either as to the quantity to be sold, the price to be paid, the identity of the purchaser or whether it shall be sold in interstate or intrastate commerce. To refer to the royalty owner as engaging in the sale is to depart from the common understanding of the words used, industry parlance, economic equivalent, or any other foundation hitherto considered a source for discerning Congressional intention." (footnote omitted)

Thus, Exxon and the other mineral fee owners have not made and could not make any sales of gas to which the Commission's abandonment jurisdiction can apply. And, this basic fact is not altered by reason of their

retention of a royalty in the event Gulf discovered and sold gas.

The holding of *Mobil* also demonstrates El Paso's misplaced reliance upon the commingling doctrine of *California* v. *Lo Vaca Gathering Co.*, 379 U.S. 366 (1965). El Paso suggests that its purchase of gas from Gulf has somehow tainted the volumes belonging to Exxon. However, before the *Lo Vaca* commingling doctrine can have any applicability, there must be a sale of gas by Exxon which is commingled with that belonging to Gulf. However, as recognized by *Mobil*, Exxon makes no sale of gas while the lease is in effect. Thus, there never has been a commingling of the volumes sold within the meaning of *Lo Vaca*. In contrast to El Paso's suggestion Exxon's mineral fee production is free of dedication to El Paso.

[301] The Commission itself has recognized in *El Paso Natural Gas Company* v. *Perry R. Bass*, 48 FPC 1269 (1972) that the delivery of gas by the lessee in interstate commerce does not impair the rights of the mineral owner to market its gas. In that case, El Paso had been purchasing the full wellstream in a particular well from the lessee, Shell Oil Company. When the lessor, Perry R. Bass, exercised his back-in working interest, El Paso questioned whether Bass required abandonment authority before he could sell his working interest gas to a pipeline company other than El Paso. The Commission held that no abandonment authority was required because El Paso's rights to purchase gas from the well were no greater than Shell's right to sell it.

Because of the extremely close factual relationship between the *Bass* opinion and the instant proceeding

it is appropriate to quote extensively from the Commission's unanimous holding in that case (48 FPC at 1276-1277):

> "The thrust of El Paso's argument is that El Paso in some manner acquired a right to purchase that which Shell had no right to sell. We will not so alter the basic property rights of mineral owners through the fiction of Section 7(b) application. El Paso is charged with notice of the limitations on Shell's power to contract, for such limitations preceded the Shell-El Paso agreement by seven years and were express in the very instrument which marked Shell's inception of title, the 1956 farmout agreement. We note that the Shell-El Paso gas contract did not purport to cover any gas save that produced from 'the properties owned by Shell.' In law, Shell contemplated selling, and El Paso contemplated buying, Shell's gas. Neither party can be heard to say that the gas contract can function to impair the pre-existing title of Bass, who was not a party to the gas contract and who could not have prevented its execution. El Paso's rights to purchase gas from the James Ranch Well can rise no higher than Shell's rights to sell that gas, yet El Paso seeks that result by its claim that it is entitled to purchase Bass' gas until this Commission orders otherwise. Shell obtained its working interest by lease assignment from Bass. The Commission recognizes the legal requirement that [302] when an assignment of a lease occurs, the successor steps '* * * into the shoes of his predecessor [and] takes the properties * * * subject to any benefits and infirmities in-

herent therein.' *Graridge Corp., et al.,* Opinion No. 408, 30 FPC 1156 at 1162. Shell took the James Ranch lease subject to the infirmity that it could not sell Bass' gas, or bind Bass to a gas sales contract.

"At the time of execution of the Shell-El Paso contract, and at the time of our certification of the sale and the facilities there provided for, Bass was a royalty owner. Bass so remained until the happening of the contingency-payout to Shell of its well costs—which triggered Bass' right to convert its royalty interest to a working interest. As a royalty owner, Bass was not a 'seller' within the meaning of the Natural Gas Act and was not in any way subject to our jurisdiction. This is the express holding of *Mobil Oil Corp.* v. *F.P.C.*, 463 F.2d 256 (CADC-1971) cert. denied 406 U.S. 976 (1972) which overturned Opinion No. 562, 42 FPC 164. Section 7(b) operates only on 'natural gas companies', that is, as defined in Section 2(6) of the Act, those who transport or sell for resale in interstate commerce. It follows, therefore, that Section 7(b) does not apply to Bass, since Bass is neither a seller or transporter at this time.

"To hold otherwise would result in a very forceful exercise of Commission jurisdiction over a class of persons which the courts have decreed to be outside our jurisdiction. Were we to read Section 7(b) as applicable to royalty owners, we would exert rate control indirectly—by examination of Section 7(b) economic issues—when we have been told that we are without authority to exert direct rate control over royalty owners. *Mobil* v. *F.P.C.*,

supra. We will not so subvert the clear holding of a court." (footnote omitted)

Here, as in Bass, there is no basis in law or fact for the Commission to find that Exxon will become automatically bound by Gulf's certificates or contracts with El Paso upon the expiration of the 50-year fixed term lease. Like Bass, Exxon [303] was a royalty owner at the time of the execution and certification of the Gulf contracts with El Paso. As a royalty owner, Exxon, like Bass, neither owns nor operates any facilities in connection with the existing transaction between Gulf and El Paso which are subject to the Commission's jurisdiction. Moreover, Exxon, like Bass, did not grant Gulf any authority with respect to the disposition of production from its mineral fee estate, and did not itself agree to any sale of such production to El Paso. Thus, to hold that Exxon, as fee owner, somehow automatically would be bound involuntarily to deliver its production to El Paso would clearly subvert the holdings of *Mobil* and *Bass.*

C. *Gulf Is Not Required To Obtain Abandonment Authority.*

El Paso questions whether Gulf requires abandonment authority to "transfer" Gulf's interests to Exxon at the expiration of the lease term. At the outset, it must be recognized that there is no "transfer" of interests at the end of the lease term. On July 14, 1975, Gulf's leasehold estate simply expires. Thus, there simply is no "transfer" either in law or in fact for the Commission to approve.

Moreover, the Commission's opinion in *Bass* dictates that no abandonment authority is required by Gulf. There, Bass, in his lease to Shell, precluded Shell from disposing of his working interest in the gas production. As a result of this contractual limitation, the Commission found that Shell could not have sold Bass' gas to El Paso and El Paso could not have purchased it. Thus, the Commission held that its power to require abandonment authorization, of necessity, is limited to the gas which Shell had the right to sell.

Here, Gulf, like Shell, obtained its right to exploit certain oil and gas rights through a lease from Exxon. Such lease granted Gulf authority to dispose of production only during the 50-year fixed term. Gulf had no right either under the lease or otherwise to commit Exxon's fee interest in production to El Paso. Thus, Gulf's right to sell production under its contract with El Paso and El Paso's right to purchase production from Gulf ceases with the expiration of the lease. Since Gulf has no right to sell production beyond the 50-year fixed lease term, it, like Shell, does not require abandonment authorization when the lease expires. And, in any event, it is apparent from El Paso's petition, and stated in Gulf's answer, that Gulf will continue to sell residue gas to El Paso pursuant to their existing surplus residue gas sales agreements.

[304]

IV

Conclusion

Wherefore, Exxon requests that the Commission find that there has been no dedication of production from its mineral fee estate and that the Commission

declare that no abandonment authority is required at the expiration of the 50-year fixed term oil and gas lease.

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Bernard A. Foster, III

Dated at Washington, D. C.,
this 20th day of June, 1975.

[305]

(Certificate of Service Omitted in Printing)

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[306]

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO, INC.

(RECEIVED JUNE 20, 1975)

Initial Brief of Gulf Oil Corporation

Docket No. CP75-209 involves a Petition by El Paso Natural Gas Company (El Paso) for a declaratory order resolving three questions:

> 1. Whether Gulf Oil Corporation (Gulf) and other lessees under fixed term leases which expire July 14, 1975 "who have been selling gas produced from said lease on a percentage type basis to Warren Petroleum Corporation for resale in interstate commerce, [must] obtain abandonment authorization pursuant to Section 7(b) of the Natural Gas Act?"
>
> 2. Whether the owners of the reversionary mineral interests, Exxon, et al., under the fixed term leases may "divert natural gas from its present movement in interstate commerce to delivery and sale in intrastate commerce?"

> 3. Whether Warren Petroleum Corporation[1] may, without prior Commission authorization, reduce its sales of residue gas to El Paso to the extent such reduction is the result of the termination of the fixed term leases?

The Petition of Texaco Inc., raises substantially the same issues with regard to another fixed term lease owned by Gulf in Ector [307] County which expires August 7, 1975, and under which Texaco is a reversionary mineral owner. The gas is currently being sold by Gulf to Phillips Petroleum Company (Phillips).

I.

GULF'S POSITION

It is Gulf's position that it is not required to secure any authorization from the Commission to discontinue deliveries of gas to El Paso or Phillips upon expiration of the term leases.

II.

STATEMENT OF FACTS

All parties are in agreement that the facts in both proceedings are without dispute. The facts in El Paso, Docket CP75-209, are as follows:

On January 26, 1951, El Paso entered into a contract with Gulf to purchase "surplus residue gas

[1] As El Paso has since conceded, this question actually relates to Gulf Oil Corporation, since Warren Petroleum Corporation has been liquidated and its Certificates, including the one involved, transferred to Gulf as a successor in interest. The operations of the former Warren Petroleum Corporation are operated as a Division of Gulf under the name "Warren Petroleum Company, a Division of Gulf Oil Corporation."

available for sale" from casinghead gas processed in Gulf's Waddell Plant in Crane County, Texas. The Commission, by Order dated May 28, 1956, issued a Certificate of public convenience and necessity to Gulf in Docket No. G-7156. The Gulf-El Paso contract was amended from time to time to increase the volume of surplus residue gas covered by the sale. As a result, the Commission issued orders from time to time, including one dated August 1, 1956, in Docket No. G-57156, and one dated February 24, 1958, in Docket No. G-13445, amending the Certificate to include these increased volumes. Part of the residue gas sold by Gulf to El Paso after processing in the Waddell Plant was produced from two oil and gas leases which provided that the leases should terminate after a fixed period of time. Exxon, Southland and others are the owners of the reversionary mineral interests under said leases. Litigation developed between Gulf and the reversionary mineral owners with regard to the date on which the fixed term of the leases expired. This litigation was consummated in the decision of the Supreme Court of Texas in *Gulf Oil Corporation, et al.* v. *Southland Royalty Company, et al.*, 496 SW(2d) 547 (1973) which held that the term leases will expire on July 14, 1975, and that on that date the mineral rights, including gas, under said leases, will revert as a matter of law to the reversionary mineral owners, and that thereafter Gulf would have no right, title or interest therein.

In Texaco, Inc., Docket No. CI75-594, the facts are as follows:

[308] Texaco is the owner of one-fourth of the reversionary mineral interests under a term lease to

Gulf, a copy of which is attached as Exhibit "A" to Texaco's Petition for Issuance of a Declaratory Order. The term of this lease expires August 7, 1975, after which date one-fourth of the mineral rights, including gas, will revert as a matter of Law to Texaco.[2]

Gulf is currently selling casinghead gas produced from this fixed term lease to Phillips pursuant to the terms of a percentage type Casinghead Gas Contract dated November 9, 1971, a copy of which, marked Exhibit "A" is attached to Gulf's Petition to Intervene in the Texaco proceeding. This contract is for a term, which as to Texaco's mineral interest, will expire with the expiration of the term lease covering said interest. Gulf understands that Phillips processes the gas delivered to it in its Goldsmith Plant in Ector County, Texas, and sells the surplus residue gas to El Paso pursuant to various FPC Rate Schedules. Texaco is not a party to Gulf's Casinghead Gas Contract with Phillips, and has never sold any gas to Phillips produced from the lands covered by the fixed term lease.

III.

El Paso's first question as to whether Gulf should be required to secure abandonment authority before ceasing deliveries of the gas produced from the term leases to Warren Petroleum Corporation has been disposed of by agreement. In Paragraph IV of its Answer to Gulf's Petition to Intervene, and in Para-

[2] The owners of most but not all of the balance of the mineral interests have extended the lease by agreement. The gas attributable to these interests will continue to be delivered by Gulf to Phillips in accordance with Gulf's Casinghead Gas Contract.

graph II of its Motion for a Briefing Schedule, El Paso concedes that by virtue of the merger of Warren Petroleum Corporation into Gulf, there are no sales of gas between Gulf and Warren for which abandonment authority could be required. The details of this merger and the Commission's Order approving Gulf's succession to Warren Petroleum Corporation's Rate Schedules are set forth in Gulf's Petition to Intervene in the El Paso proceeding in Paragraph IV, and are incorporated herein.

IV.

El Paso's second question as to whether the reversionary mineral interest owners are required to secure Commission [309] authorization prior to disposition of their gas after termination of the leases is a matter for the reversionary mineral owners, although much of the discussion which follows is equally applicable to that question.

V.

The remaining question raised by El Paso is whether Gulf [3] should be required to secure Commission authorization before reducing its sales of surplus residue gas from the Waddell Plant to El Paso following termination of the fixed term leases on July 14, 1975. A similar, although not identical question, involves Gulf's delivery of gas to Phillips attributable to Texaco's reversionary mineral interest after ex-

[3] El Paso couched its question in terms of Warren Petroleum Corporation but since Warren has been merged with Gulf, the question is actually directed at Gulf.

piration of the fixed term of that lease on August 7, 1975.

It is Gulf's position that in neither case did it purport to dedicate the gas to El Paso which it will not own after expiration of the leases, and that had it attempted to do so, any such dedication would have been ineffective as a matter of law. Gulf's contract to sell residue gas to El Paso from its Waddell Plant [4] covers precisely what the language implies "surplus residue gas available for sale." This gas results from processing gas produced from various leases owned by Gulf or purchased from other producers. Upon expiration of the fixed term leases, the gas produced therefrom will no longer contribute to the surplus residue gas Gulf could sell to El Paso. As a matter of law, this gas will belong to the reversionary mineral owners and Gulf will have no control over it or their disposition thereof. The same is true with regard to Gulf's sale of gas produced from the term lease covering the Texaco mineral interest. The Casinghead Gas Contract with Phillips terminates by its own terms as to the Texaco interest with the termination of the lease covering such interest. Gulf attempted no dedication of gas beyond the interests it owned and no authority is required from the Commission to limit its deliveries to El Paso and Phillips to the interests it owned when those commitments were made.

Furthermore, even if Gulf had attempted to commit the gas that will be the property of reversionary

[4] Warren Petroleum Company, a Division of Gulf Oil Corporation's Rate Schedule No. 43.

mineral owners beyond the term of its ownership, such attempt would have been ineffective to bind it to continue a delivery of gas to which it had no right.

[310] *El Paso* v. *Bass,* Opinion No. 638, 48 FPC 1269 (1972) is dispositive of this question. In that case Bass farmed out leased acreage to Shell, reserving the right to one-half of the working interest after the well had paid out. Shell drilled a well and contracted to sell the gas to El Paso. The well paid out. Bass claimed his one-half of the working interest. El Paso filed a Petition for a Declaratory Order as it did in this proceeding, to require Bass to secure Commission approval before proceeding with his contemplated sale of the gas to another purchaser. The Commission held that no Commission action was required. The Commission's observations are startlingly applicable to this proceeding. The Commission stated:

> "*The thrust of El Paso's argument is that El Paso in some manner acquired a right to purchase that which Shell had no right to sell.* We will not so alter the basic property rights of mineral owners through the fiction of Section 7(b) application. El Paso is charged with notice of the limitations on Shell's power to contract, for such limitations preceded the Shell-El Paso agreement by seven years and were express in the very instrument which marked Shell's inception of title, the 1956 farmout agreement. We note that the Shell-El Paso gas contract did not purport to cover any gas save that produced from 'the properties owned by Shell.' *In law, Shell contemplated selling, and*

> *El Paso contemplated buying, Shell's gas.*" (p. 9, Op. 638)[5]

El Paso's position here is substantially the same, that it somehow acquired the right to purchase that which Gulf had no right to sell. The leases under which Gulf acquired its fixed term rights were executed many years before any contract was made with El Paso. These leases were of record and in any event Gulf never purported to sell to El Paso gas to which it had no right. The Commission further stated:

> "*Neither party can be heard to say that the gas contract can function to impair the pre-existing title of Bass,* who was not a party to the gas contract and who could not have prevented its execution. *El Paso's rights to purchase gas from the James Ranch Well can rise no higher than Shell's rights to sell that gas, yet El Paso seeks that result by its claim that it is entitled to purchase Bass' gas until this Commission orders otherwise.* Shell obtained its working interest by lease assignment from Bass. The Commission recognizes the legal requirement that when an [311] assignment of a lease occurs, the successor steps '. . . into the shoes of his predecessor [and] takes the properties . . . subject to any benefits and infirmities inherent therein.' *Graridge Corp., et al.,* Opinion No. 408, 30 FPC 1156 at 1162. Shell took the James Ranch lease subject to the infirmity that it could not sell Bass' gas, or bind Bass to a gas sales contract." (p. 9, Op. 638)

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[5] All emphasis in the brief is added.

Language could hardly be more applicable to this proceeding. Gulf, like Shell, never owned the gas which El Paso would subject to Commission authority. As the Commission pointed out in *Bass,* neither party can be heard to say that Gulf's contracts with El Paso and Phillips could impair the pre-existing reversionary title of the mineral owners, even if they had purported to do so, which they did not.

The above quotation, beginning with the words "El Paso's right to purchase . . ." was quoted by the Commission with approval in *Blair-Vreeland,* Docket CI74-331, in Opinion No. 724A, page 4, as recently as May 14, 1975. In that case Blair-Vreeland drilled wells on a farmout from Exxon which covered a lease which had *previously* been dedicated by contract to Tennessee. The Commission held that Blair-Vreeland was a successor in interest to Exxon, and as such bound by its contract dedication. The Commission distinguished the *Bass* case in part with the above quotation. In its discussion, the Commission specifically agreed with the following statement, taken from Blair-Vreeland's application:

> "' . . . *In Bass the question was not what Bass could bestow on Shell, but what Bass in fact did bestow* [*on Shell*] *by way of a farmout agreement.* Bass retained a 1/8th override convertible into a 1/2 working interest after payout of the cost of drilling the well to Shell. Shell attempted to dedicate 100% of the gas [to El Paso] and the Commission held that the gas to which Bass was entitled (1/2) was not dedicated because it was never owned by Shell. (Application, pp. 10-11)' " (p. 4, Op. 724-A)

The only difference between that analysis of the *Bass* case and this case is that while Bass could have bestowed the right of full disposition on Shell, it did not; while in these proceedings Gulf never owned the reversionary interests and could not have committed them to El Paso. The Commission continued its discussion in the *Bass* case:

> "*At the time of execution of the Sell-El Paso contract,* and at the time of our certification of the sale and the facilities there provided for, *Bass was a royalty owner. Bass so remained until the happening of the contingency-payout* [312] to Shell of its well costs—*which triggered Bass's right to convert its royalty interest to a working interest.* As a royalty owner, Bass was not a 'seller' within the meaning of the Natural Gas Act and was not in any way subject to our jurisdiction. This is the express holding of *Mobil* v. *F.P.C.,* —— F.2d —— (CADC 1971) cert denied —— U.S. —— (1972), which overturned Opinion 562, 42 FPC 164. Section 7(b) operates only on 'natural gas companies', that is, as defined in Section 2(6) of the Act, those who transport or sell for resale in interstate commerce. *It follows, therefore, that Section 7(b) does not apply to Bass, since Bass is neither a seller or transporter at this time.*" (p.10, Op. 638)

As in *Bass,* during the terms of the leases the reversionary mineral owners were royalty owners, and as such were not "sellers" within the meaning of the Natural Gas Act to which Section 7(b) could apply. The Commission further continued its discussion in *Bass:*

"But did Bass become jurisdictional at the point in time when it converted its royalty interest to a working interest? This question can be answered in the affirmative only if we can conclude that Bass then became a seller automatically bound by the Shell-El Paso contract and our certificates. We have no basis in law to reach such a conclusion, particularly so since Bass had precluded such a result in its 1956 farmout with Shell. It is not our function to re-make contracts for the parties. *And it is patently clear that one who proposes to become a seller in interstate commerce is entitled to accept or reject, our certification without compulsion to render service."* (p. 10, Op. 638)

As in *Bass* there is no basis in law upon which to conclude that the mineral owners will become sellers to El Paso and Phillips upon termination of the leases. This Commission cannot remake the reversionary provisions of the term leases to compel the mineral owners to dedicate their interests to El Paso contrary to their desires.

In its Petition for a Declaratory Order, El Paso in Footnote 14 on page 7 discusses the *Bass* case, and makes a concession which in our judgment virtually disposes of these proceedings. El Paso there stated:

> "By its order issued December 8, 1972, the Commission decided that Bass' prior royalty interest did not make him a seller of natural gas in interstate commerce for resale nor did his conversion from a royalty interest to a [313] working interest; therefore, the producer was free to sell his share of the gas to Natural."

Transposing the names of the parties, El Paso apparently concedes that neither the reversionary mineral owners' prior royalty interests nor the conversion of such royalty interests to working interests made them "seller[s] of natural gas in interstate commerce for resale * * *." Even more decisive is the concession that therefore the reversionary mineral interest owners will be free to sell their share of the gas elsewhere. The only distinctions El Paso made of the *Bass* case are stated in the last paragraph of the Footnote, which reads:

> "The Commission in Perry R. Bass did not address itself to the issues raised here. In particular, the Commission did not address itself to whether a party in the position of Gulf (i.e., a prior working interest owner) must obtain abandonment authorization before the lessor may 'back in' to the working interest. Moreover, the factual situation is so different in this case, when the entire output of the wells is proposed to be diverted to intrastate commerce, that the Perry R. Bass decision should not be controlling on any issue raised herein by El Paso."

The argument that *Bass* is distinguishable because it did not pass on the question as to whether Shell was required to secure abandonment approval from the Commission before Bass could dispose of its share of the gas to Natural is clearly without merit. While the Commission made no specific mention of Shell, if Bass was authorized to dispose of the gas to another purchaser without abandonment approval, no require-

ment could be imposed on Shell to prevent the very disposition of the gas the Commission had just approved. Obviously if Bass sold its gas to Natural with the Commission's blessing, Shell couldn't deliver the same gas to El Paso. It would be an anomaly for the Commission to hold that the reversionary mineral interest owners will be entitled, like Bass, to dispose of their gas to another purchaser, but that Gulf will be required to deliver that very gas to El Paso and Phillips until it secures some further approval from the Commission. Any such reading of the *Bass* case would be ridiculous.

The other distinction drawn by El Paso was that the factual situation was different because the entire output of the wells in the present proceedings is proposed to be "diverted to intrastate commerce" borders on the absurd. Surely the validity of *Bass* is not dependent upon whether a part or the entire output of wells is involved. There is nothing in *Bass* to indicate that Bass' right of disposition of his gas would have been any the less if he elected to sell it to a purchaser for intrastate use rather than to another interstate purchaser. Commission [314] decisions cannot rest on any such irrelevant distinctions. The *Bass* case is in point and dispositive of these proceedings.

Conclusion

Wherefore, Gulf submits that no further action by the Commission by way of abandonment or otherwise is required of Gulf with regard to the disposition of the gas attributable to the reversionary mineral interests after expiration of the limited term leases involved in these proceedings.

Respectfully submitted,

Gulf Oil Corporation

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Dated: June 18, 1975

(Verification Omitted in Printing)

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(Certificate of Service Omitted in Printing)

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO, INC.

(RECEIVED JUNE 23, 1975)

Initial Brief of Mineral Interest Owners

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[318] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO, INC.

Initial Brief of Mineral Interest Owners [1]

I.

STATEMENT OF THE CASE

On January 20, 1975, El Paso Natural Gas Company (El Paso) filed a petition for declaratory order in Docket CP75-209 pursuant to Section 1.7(c) of the Rules of Practice and Procedure.[2] The "controversy or uncertainty"[3] which is [319] the subject of El

[1] The Mineral Interest Owners on whose behalf this petition to intervene and answer is filed are listed on Exhibit A hereto.

[2] Section 1.7(c) of the Commission's Rules of Practice and Procedure states:

> (c) *For declaratory orders.* Petitions for the issuance, in the discretion of the Commission, of a declaratory order to terminate a controversy or remove uncertainty shall state clearly and concisely the controversy or uncertainty which is the subject of the petition, shall cite the statutory provision or other authority involved, shall include a complete statement of the facts and grounds prompting the petition, together with a full disclosure of petitioner's interest, and shall conform to the requirements of §§ 1.15 and 1.16.

[3] Contrary to the requirement of Section 1.7(c), El Paso does not state "clearly and concisely the controversy or uncertainty" which is the subject of its petition. Instead, El Paso requests the Commission to resolve three complex questions which are framed in a manner clearly prejudicial to Mineral Interest Owners and

Paso's petition arises from the termination on July 14, 1975, of the 50-year fixed-term oil and gas lease held by Gulf Oil Corporation (Gulf) on the approximately 46,000 acres in Crane County, Texas, referred to in El Paso's petition. The gas attributable to Gulf's fixed-term leasehold estate is sold to El Paso at the tailgate of the Waddell Gasoline Plant which is operated by Warren Petroleum Company (Warren), a division of Gulf Oil Corporation.[4] Under established principles of Texas oil and gas law, Gulf will be the sole owner and seller of this gas production until its leasehold estate terminates on July 14, 1975. Upon termination of Gulf's leasehold estate on July 14, 1975, Mineral Interest Owners will hold fee simple title to their pro rata share of the mineral estate underlying the subject acreage.[5] *Gulf Oil Corp.* v. *Southland Royalty Co.*, 496 S.W.2d 547, 552 (Tex. Sup. Ct. 1973). In other words, upon termination of the lease on July 14, 1975, Gulf will have no right, title or interest in any gas produced from and attributable to the fee simple mineral estate of Mineral Interest Owners and will have sold to El Paso all of the gas to which Gulf was entitled under the lease. Thereafter, Gulf will continue to sell to [320] El Paso all of the

contrary to the legal relationship between the parties. At no point does El Paso take a position on how these questions should be resolved by the Commission. However, its "suggestions" and the manner in which it has framed the questions to be decided leave no doubt as to the result El Paso seeks.

[4] According to El Paso, such sales represent approximately 42% of the gas being sold to El Paso at this point of delivery (Pet. 5).

[5] The respective percentage owned by each Mineral Interest Owner in the mineral estate covered by this lease is also shown on Exhibit A hereto.

gas it could have dedicated and did dedicate under its contracts with El Paso and all of the gas covered by the certificates which the Commission has issued with respect to such sales to El Paso.

Mineral Interest Owners have agreed to sell to Intratex Gas Company[6] (Intratex) the gas attributable to the fee simple mineral estate they will hold on July 14, 1975, following the termination of Gulf's leasehold estate. According to El Paso, this sale to Intratex will result in a "diversion" of sales of surplus residue gas from interstate commerce to intrastate commerce.[7] El Paso "questions" whether such diversion should take place without prior clarification of three questions by the Commission. When these three questions are stripped of the verbal camouflage superimposed by El Paso, the dispositive question boils down to whether Mineral Interest Owners must obtain Section 7(b) abandonment authorization before initiating sales to the purchaser of their choice (Intratex).

On April 8, 1975, Texaco Inc. (Texaco) filed in Docket CI75-594 a petition for declaratory order with respect to the termination on August 7, 1975, of a 50-year fixed-term lease held by Gulf on property in

[6] Intratex, an intrastate buyer of gas, is a wholly owned subsidiary of Houston Natural Gas Corporation, a distributor of gas in the City of Houston, Texas, and environs.

[7] As detailed herein, the "diversion" alleged by El Paso is illusory because Mineral Interest Owners are not now making, nor have they made in the past, any sales of gas attributable to their mineral estate. Of course, in order to have a "diversion" of gas sales, there must be some existing sale from which the gas is diverted.

Ector County, Texas. According to Texaco's petition, the gas attributable to this fixed-term leasehold estate of Gulf is sold under a percentage-type of casinghead gas contract to Phillips Petroleum Company (Phillips) as operator of the Goldsmith Gasoline Plant in Ector County, Texas. The residue gas available at the tailgate of this plant is then sold to El Paso.

[321] By order[8] issued June 3, 1975, the Commission consolidated the proceedings in Docket CP75-209 with those in Docket CI75-594. This brief is directed to the issue raised by El Paso's petition in Docket CP75-209.[9]

II.

ARGUMENT

A. *Factual Background*

As noted above, Mineral Interest Owners are the owners of the reversionary mineral estate underlying approximately 43,000 acres in Crane County, Texas. This mineral estate is presently subject to a 50-year fixed-term oil and gas lease[10] [322] dated July 14,

[8] In footnote 1 of this order, the Commission stated that the interest of Mineral Interest Owners "represents approximately 81% of the term lease gas." Of course, Mineral Interest Owners own no interest in the term lease gas. *See* footnote 20, *supra*.

[9] If the facts in Texaco's petition "are identical in all material respects to the facts set forth in El Paso's petition", then the arguments set forth herein would also be applicable to any issues raised by the petition filed by Texaco in Docket CI75-594.

[10] Such term oil and gas leases now are extremely rare, in fact almost unique. As early as 1928, it was recognized that fixed-term leases had "long been in disuse" and were "of no practical im-

1925, as amended March 16, 1926,[11] between W. N. Waddell, et al (predecessors of Mineral Interest Owners), as Lessors, and Gulf Production Company (predecessor of Gulf), as Lessee.[12]

Mineral Interest Owners' only present interest in the casinghead gas being produced by Gulf from the lease is a royalty of 1/8th of 4¢ per Mcf for all casinghead gas produced and sold from said lease. Under this royalty provision, Mineral Interest Owners have no right to take gas in kind or to receive a royalty based

portance" in Texas. Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 7 Tex.L. Rev. 1, 15 (1928). *See also* 3 Williams, Oil & Gas Law § 601.1; Brown, Law of Oil and Gas Leases § 5.01. Virtually all modern oil and gas leases provide for the leasehold estate to remain in effect as long as either oil or gas is produced in paying quantities. 2 Kuntz, Law of Oil & Gas § 26.1 at 244; 1A Summers, Law of Oil & Gas § 153 at 381. Indeed, the fact that, except for Texaco, no other mineral interest owners have sought to intervene or have filed similar petitions for declaratory orders indicates that there are few, if any, other such term leases.

[11] Copies of this 50-year fixed-term oil and gas lease and amendment are attached to El Paso's petition as Exhibits A and B, respectively. As noted in El Paso's petition (p. 3, fn. 1), this lease and amendment were recorded in the Deed Records of Crane County, Texas, thus putting parties such as El Paso on constructive notice of the terms and conditions of the lease, including the fact that it terminates on July 14, 1975. Tex. Rev. Civ. Stat. Ann. § 6646.

[12] El Paso's petition (p. 1) refers to six other lessees in addition to Gulf. However, it should be noted that each of these six other lessees obtained its interest as a result of an assignment of a small portion of Gulf's 50-year fixed-term lease and, therefore, took such leasehold interest subject to the same terms and conditions as Gulf. For simplicity, all current lessees will be referred to herein as "Gulf."

on the price received by the Lessee for the gas.[13] The lease specifically provides "that this lease shall not remain in force longer than 50 years from" the date thereof.[14] Any doubt as to the date [323] of termination was removed in *Gulf Oil Corp.* v. *Southland Royalty Co., supra,*[15] where the Supreme Court of Texas hedl:

> The duration of the estate granted is traditionally determined by the habendum clause. 2 Summers, The Law of Oil and Gas, Perm.Ed. § 303.1, p. 319. This need not be the case, for the instrument may provide elsewhere for the enlargement of the term stated in the habendum. *See Standard Oil & Gas Co.* v. *Christian,* 83 S.W.3d 408 (Tex. Civ. App. 1935, writ ref'd); *Humphrys* v. *Skelly Oil Co.,* 83 F2d 989 (5th Cir. 1936). It is always a question of resolving the intention of the parties from the entire instrument. In looking to the place in this lease where we would expect to find the term stated, we find this very certain language "Provided, that this lease shall not remain in force longer than fifty (50) years from this . . ." With a plain and certain answer to the question of when the lease terminates, we cannot change that answer with words elsewhere in the lease not certainly directed to the same question. *Moore* v. *Smith,* 443 S.W.2d 552 (Tex. 1969); *Cartwright* v. *Trueblood,* 90 Tex. 535, 39 S.W. 930 (1897).

[13] Section 2 of the lease.

[14] Section 1, paragraph 2 of the lease.

[15] A copy of this decision is attached to El Paso's petition as Exhibit D.

The judgments below, declaring and adjudging the lease to terminate finally on July 14, 1975, are affirmed.

On January 26, 1951, Gulf executed a Residue Gas Purchase Agreement[16] (1951 Agreement) with El Paso under which Gulf agreed to sell and El Paso to purchase Gulf's "surplus residue gas" at the tailgate of Gulf's Waddell Gasoline Plant in Crane County, Texas. As defined in Article I of the 1951 Agreement, the volumes of "surplus residue gas" to be sold were limited to volumes remaining after Gulf processed the [324] Gas in the Waddell plant, met all of its obligations under the terms of its oil and gas leases in the area, satisfied its fuel requirements for its drilling and plant operations, and met its obligations under an existing gas sales agreement.[17] Following the *Phillips* decision,[18] Gulf received a certificate by order issued May 26, 1956, in Docket G-7156 authorizing this sale of "surplus residue gas" to El Paso.

On March 1, 1972, El Paso and Warren[19] entered into an additional Residue Gas Purchase Agreement (1972 Agreement)[20] covering additional volumes of

[16] This contract is on file with the Commission as part of Warren's FPC Gas Rate Schedule No. 43.

[17] 1951 Agreement, Art. I(d).

[18] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

[19] Following its acquisition of Warren Petroleum Corporation in 1957, Gulf conveyed its interest in the Waddell Plant, the gathering system associated therewith, and the 1951 Agreement to Warren. On December 31, 1971, Warren was merged into Gulf and now operates as a division of Gulf.

[20] This contract is on file with the Commission as a part of Warren's FPC Gas Rate Schedule No. 66.

surplus residue gas attributable to newly executed contracts between producers and Warren and renewals or extensions of existing contracts between producers and Warren. By order issued July 22, 1974, in Docket CI72-760, the Commission authorized the sale of additional surplus residue gas under the 1972 Agreement. Neither the 1951 Agreement nor the 1972 Agreement purports to cover any gas attributable to the mineral estate of Mineral Interest Owners.[21]

As stated in its petition, El Paso takes delivery of the surplus residue gas which Warren has available at the tailgate of the Waddell Gasoline Plant and transports such gas through its jurisdictional facilities for ultimate consumption in [325] interstate commerce. According to El Paso's petition, approximately 25,000 Mcf per day of the 60,000 Mcf per day of surplus residue gas which El Paso purchases at the tailgate of the Waddell Plant reflects gas production attributable to Gulf's leasehold estate under the 50-year fixed-term lease.[22]

Upon termination of Gulf's leasehold estate on July 14, 1975, Mineral Interest Owners propose to sell to

[21] Mineral Interest Owners were not parties to these contracts or to any contracts under which Gulf sold its gas and could not have prevented the execution of such contracts.

[22] In its petition, El Paso states (p. 5) that Southland, the Warren Wright Estate, and the Penn heirs (which comprise the Mineral Interest Owners) "collectively own 80% of the 50-year fixed-term lease gas and are considering its sale." As previously noted, these Mineral Interest Owners do not own any of the 50-year fixed-term lease gas, since all such gas is attributable to Gulf's leasehold interest and is owned by Gulf. What Southland, the Warren Wright Estate, and the Penn heirs do own collectively is approximately 80% of the gas production which will be attributable to the fee simple mineral interests of all of the Mineral Interest Owners upon expiration of Gulf's 50-year fixed-term lease.

Intratex the gas attributable to the fee simple mineral estate they will own.

B. *Mineral Interest Owners Are Not Required To Obtain Abandonment Authorization Under Section 7(b) Before Initiating Sales of Gas to Intratex*

There is no merit to El Paso's suggestion that Mineral Interest Owners must secure abandonment authorization under Section 7(b) of the Natural Gas Act before exercising their rights as mineral estate owners to make sales in the intrastate market of gas attributable to the mineral estate they will hold on July 14, 1975. This suggestion rests wholly on the invalid assumption that volumes of gas attributable to the mineral estate of Mineral Interest Owners have somehow been dedicated to the interstate market. However, as detailed below, no such dedication has occurred, and therefore, Section 7(b) clearly does not apply to Mineral Interest Owners under the undisputed facts before the Commission in this case.

[326] Preliminarily, Mineral Interest Owners agree with El Paso's statement (p. 7) that, once dedicated to interstate commerce, gas reserves may not be removed from interstate commerce without abandonment authorization.[23] But this legal conclusion begs the question of whether gas attributable to the mineral estate of Mineral Interest Owners has been dedicated to interstate commerce. Likewise, El Paso's reliance on *California* v. *LoVaca Gathering Co.*, 379 U.S. 366 (1965), is misplaced because there has been

[23] *Sunray Mid-Continent Oil Co.*, 364 U.S. 137 (1960).

no physical movement of any gas attributable to the mineral estate of Mineral Interest Owners. Indeed, since the right of such Mineral Interest Owners to market any gas attributable to their mineral estate will not even come into being until July 14, 1975, no gas attribuable to such mineral estate could have been previously delivered by Gulf and no dedication of such gas could have occurred.

The Natural Gas Act comprehends that before jurisdiction attaches there must be a voluntary dedication of service to the interstate market. Only when a producer *chooses to sell* gas in interstate commerce and *commences deliveries* does he make himself a natural gas company.[24] In short, the Commission has no authority under the Natural Gas Act to compel a producer to sell his gas in interstate commerce. And although the Commission has the authority under Section 7(e) of the Act to condition certificates which it issues, a producer may reject a conditioned certificate offered by the Commission.[25]

[327] It is likewise clear that gas may only be dedicated to the interstate market to the extent that a seller has the authority to dispose of the gas involved. For example, if under a particular lease the lessee has the right to explore and develop only a specified portion of the mineral estate, i.e., only to a particular

[24] *Argo Oil Corp.*, 15 F.P.C. 601, 618 (1955); *Pioneer Gathering System*, 23 F.P.C. 260, 263 (1960). Section 7(e) of the Act requires that before issuing a certificate the Commission must find the applicant "willing" to perform the service.

[25] *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U.S. 378, 387-88 (1959).

depth, the lessee can only dedicate to interstate commerce those volumes of gas which he has the right to produce and develop. By making sales of gas produced from his lease under a certificate issued by the Commission, such a lessee does not and cannot dedicate to interstate commerce gas not covered by the lease.

Similarly, the fact that Mineral Owners retain a royalty interest under Gulf's term lease does not make them "sellers" of gas in interstate commerce within the meaning of the Natural Gas Act,[26] and in no way dedicates gas attributable to their mineral estate to the interstate market. On this point, the decision in *Mobil Oil Corp* v. *F.P.C.*,[27] is dispositive. In that case, the Commission had held that the royalty provision in an oil and gas lease created an economic interest in interstate sales of gas and constituted a sale of gas for resale in interstate commerce so that land owners holding such royalty interests were natural gas companies subject to the Natural Gas Act. [328] In reversing the Commission's decision,[28] the Court of Appeals found that,

[26] As noted by Judge Brown in *J.M. Huber* v. *Denman*, 367 F.2d 104 (5th Cir. 1966):

> . . . there can be no "sale" of gas by royalty owners since they have no gas to sell. And this seems to be true as a matter of oil and gas law whether based on the ownership-in-place concept followed by Texas and others or in nonownership theories of other jurisdictions. For all agree that as the gas leaves in the well-mouth the entire ownership of the gas is in the lessee, none being reserved in the lessor. (367 F.2d at 113-4).

[27] 463 F.2d 256 (D.C. Cir. 1971) *crt. denied*, 406 U.S. 976 (1972). Any discussion of this controlling case is conspicuously absent from El Paso's petition.

[28] Opinion No. 562, 42 F.P.C. 164.

under "an ordinary lease by the landowner to the producer, there is neither a 'customary' sale in interstate commerce nor its equivalent in economic effect."[29] Noting that execution of a conventional lease precedes the sale of natural gas, the court further concluded that royalty interests are "too far removed from the interstate sale" and, therefore, outside the Commission's control.[30]

The holding in *Mobil* is particularly applicable in this case because the royalty provision in Gulf's fixed-term lease is not related to the market price at which the gas is sold but to the 1/8th of 4¢ per Mcf for all casinghead gas. Therefore, the royalty interests of Mineral Interest Owners do not include a percentage interest in the gas sold by the lessee. Thus, these royalty interests are even further removed from any possible jurisdictional sale of gas than those involved in *Mobil* and clearly do not subject gas attributable to the mineral estate of Mineral Interest Owners to the Commission's jurisdiction.

As applied to the instant case, the foregoing basic principles require the conclusion that any gas that may be produced from the mineral estate following the expiration of Gulf's 50-year fixed-term lease has not been and could not have been dedicated to interestate commerce by Gulf. Under its lease, Gulf possessed only a 50-year leasehold right and had no legal authority to provide for disposition of any gas produced therefrom beyond the termination date of the lease.[31] [329]

[29] 463 F.2d at 262.

[30] *Id.* at 262-263.

[31] In *Mobil*, the court noted that a lease gives a lessee "*all pos-*

Consequently, Gulf could not dedicate to the interstate market volumes attributable to the mineral estate of Mineral Interest Owners, which volumes will be produced only after Gulf's leasehold estate terminates."[32]

Moreover, El Paso's suggestion that Mineral Interest Owners must obtain Section 7(b) abandonment authorization before initiating sales to Intratex is clearly contrary to the principles enunciated by the Commission in rejecting similar contentions in *El Paso Natural Gas Co.* v. *Perry R. Bass.*[33] In that case, Bass had entered into a farmout agreement with Shell Oil Company under which Bass retained an overriding royalty and an option to convert such royalty interest into a one-half working interest within 30 days after payout. Under the contract, Shell had no authority to sell any gas attributable to Bass' working interest. Beginning in 1961, Shell sold gas from the property to El Paso under a certificate issued by the Commission. After payout occurred in 1972, Bass elected to convert his overriding royalty interest to a working interest and contracted to sell the gas to another pipeline. El Paso filed a complaint and petition for declaratory order with the Commission asserting that Bass was required to obtain "abandonment authorization pursuant to

sessory interests in gas produced during the life of the lease" (463 F.2d at 260) (emphasis supplied).

[32] It does not appear that Gulf has ever attempted to dedicate to El Paso any of the volumes of gas attributable to the mineral estate of Mineral Interest Owners. In any event, even if Gulf had attempted to sell gas attributable to the mineral estate of Mineral Interest Owners, El Paso was charged with notice of the limitations on Gulf's power to contract. *See* footnote —, *supra.*

[33] Opinion No. 638, 48 F.P.C. 1269 (1927).

Section 7(b) of the Natural Gas Act, . . . prior to the diversion of natural gas by Bass from its present movement in interstate commerce to El Paso."[34]

[330] The Commission found that Bass was not a "natural gas company" within the meaning of the Natural Gas Act because Bass had not previously sold or transported gas attributable to his interest under the lease and had not authorized Shell to do so.[35] Since Bass had made no sale in interstate commerce for resale, he had rendered no service to the interstate market and was within the reach of Section 7(b).[36] In particular, the Commission stated:[37]

> *The thrust of El Paso's argument is that El Paso in some manner acquired a right to purchase that which Shell had no right to Sell.* We will not so alter the basic property rights of mineral owners through the fiction of Section 7(b) application. *El Paso is charged with notice of the limitations on Shell's power to contract,* for such limitations preceded the Shell-El Paso Agreement by seven years and were expressed in the very instrument which marked Shell's inception of title, the 1956 farmout agreement. We note that the Shell-El Paso gas contract did not purport to cover any gas

[34] Complaint of El Paso Natural Gas Company and Petition for Issuance of a Declaratory Order, *El Paso Natural Gas Co.* v. *Perry R. Bass,* Docket RP73-45, filed September 26, 1972, at 1. *Compare* El Paso's request in the instant case for an order directing Mineral Interest Owners to secure Commission authorization before they can "divert natural gas from its present movement in interstate commerce. . . ." (Pet. at 1)

[35] 48 F.P.C. at 1276.

[36] *Id.* at 1275-1276.

[37] *Id.* at 1276-1277.

save that produced from 'the properties owned by Shell.' In law, Shell contemplated selling, and El Paso contemplated buying, Shell's gas. *Neither party can be heard to say that the gas contract can function to impair the pre-existing title of Bass, who was not a party to the gas contract and who could not have prevented its execution. El Paso's rights to purchase gas from the James Ranch Well can rise no higher than Shell's rights to sell that gas, yet El Paso seeks that result by its claim that it is* [331] *entitled to purchase Bass' gas until this Commission orders otherwise.*"

* * * *

"At the time of the execution of the Shell-El Paso contract, and at the time of our certification of the sale and the facilities there provided for, *Bass was a royalty owner.* Bass so remained until the happening of the contingency-payout to Shell of its well costs—which triggered Bass' right to convert its royalty interest to a working interest. As a royalty owner, Bass was not a "seller" within the meaning of the Natural Gas Act and was not in any way subject to our jurisdiction. This is the express holding of *Mobil Oil Corp.* v. *F.P.C.*, 463 F.2d 256 (CADC-1971) cert. denied 406 U.S. 976 (1972), which overturned Opinion No. 562, 42 FPC 164. Section 7(b) operates only on "natural gas companies," that is, as defined in Section 2(6) of the Act, those who transport or sell for resale in interstate commerce. It follows, therefore, that Section 7(b) does not apply to Bass, since Bass is neither a seller or transporter at this time." (Emphasis supplied.)

The Commission's rationale in *Bass* is clearly applicable to this case. In both cases, the gravamen of El Paso's complaint has been substantively the same, i.e., that abandonment authorization under Section 7(b) was required prior to the "diversion" of natural gas from alleged present movement in interstate commerce.[33] Likewise, in both cases, the thrust of El Paso's arguments has been that in some manner it acquired a right to purchase gas attributable to a mineral interest through dealings with an independent third party (Gulf) which had no right to sell such gas even though El Paso was on notice of the third party's limited rights.[34] Moreover, in the instant case, the mineral [332] estate of the Mineral Interest Owners, unlike the option retained by Bass, has not been created from the lease under which the sales to El Paso are made. Since Mineral Interest Owners have no present or future interest in that lease, they are even further removed from the agreement with El Paso than was Bass. Thus, no conceivable basis exists for finding that gas from the mineral estate of Mineral Interest Owners has previously been dedicated to the interstate market, and as in *Bass* the Commission should find and declare that Mineral Interest Owners are not required to obtain abandonment authorization under Section 7(b) prior to commencing the sale of gas to Intratex.

The Commission recently reiterated the *Bass* doctrine in Opinion No. 724 issued March 18, 1975, in *Blair-Vreeland,* Docket CI74-331. In denying rehear-

[33] See footnote 34, *supra.*

[34] See footnote 11, *supra.*

ing in Opinion No. 724-A issued May 14, 1975, the Commission stated:

> We will also elaborate on our comments on the *Bass* case. In doing so, we agree with the following statement of that case offered by Blair-Vreeland:
>
> > . . . In *Bass* the question was not what Bass could bestow on Shell, but what Bass in fact did bestow [on Shell] by way of a farmout agreement. Bass retained a 1/8th override convertible into a 1/2 working interest after payout of the cost of drilling the well to Shell. Shell attempted to dedicate 100% of the gas [to El Paso] and the Commission held that the gas to which Bass was entitled (1/2) was not dedicated because it was never owned by Shell. (Application, pp. 10-11)
>
> The question before the Commission was whether Shell's dedication to El Paso included the portion of the acreage covered by the working interest held by Bass. The Commission held that it did not, and in so holding, stated conclusions entirely consistent with those we have reached in the instant case; . . .

[333] Similarly, in this case the question before the Commission is whether Gulf's dedication to El Paso included or is binding upon the gas attributable to the mineral estate of Mineral Interest Owners. As the Commission recognized in *Bass* and reiterated in *Blair-Vreeland,* even if Gulf had attempted[40] to dedicate the gas of Mineral Interest Owners, there would have been no dedication because such gas was never owned by Gulf. Since El Paso's rights to purchase gas attributable to the mineral estate of the Mineral Interest Owners can rise no higher than Gulf's rights to sell that gas, and since Gulf neither had nor ever asserted any right to sell such gas, it is clear that there is no merit to any claim that Mineral Interest Owners are required to obtain prior permission and approval of the Commission before commencing deliveries under their contract with Intratex.

[40] It is clear, however, that Gulf has never attempted to dedicate the gas attributable to the mineral estate of Mineral Interest Owners.

El Paso futilely attempts to distinguish *Bass* on the grounds that (1) in *Bass,* the Commission did not consider whether a party in the position of Gulf must obtain abandonment authorization before the lessor may "back in" to the working interest, and (2) in *Bass,* sales of gas were "diverted" from one interstate pipeline to another interstate pipeline while in this case the sale to Intratex will "divert" gas from the interstate to the intrastate market. Neither of these alleged distinctions undercuts in the slightest the controlling effect of the *Bass* decision on the issues raised by El Paso's petition. As detailed *infra* at pp. 17-20, there is absolutely no merit to El Paso's suggestion that Gulf must obtain abandonment authorization to "effectuate the transfer by reversion" to Mineral Interest Owners of their mineral estate upon termination of Gulf's 50-year fixed-term leasehold estate.[41]

El Paso's "diversion" distinction likewise is meaningless because the holding in *Bass* was clearly not

[41] We assume that El Paso's "back in" assertion is the same as its reference to "transfer by reversion."

based upon [334] whether the purchaser to whom Bass sold his gas was an interstate or an intrastate pipeline. Moreover, despite El Paso's repeated assertions to the contrary, Mineral Interest Owners' sale of gas to Intratex will not *divert* gas from the interstate to the intrastate market. As previously noted, before any such "diversion" could occur, there must have been some prior dedication to the interstate market of the gas reserves attributable to the mineral estate of Mineral Interest Owners. But in light of *Mobil*, *Bass* and *Blair-Vreeland,* there has been no such dedication and therefore there will be no such diversion.

C. *El Paso's Other Suggestions*[42] *Are Likewise Without Merit*

El Paso suggests that Gulf must obtain abandonment authorization pursuant to Section 7(b) of the Act in order to "effectuate the transfer by reversion" to Mineral Interest Owners of the mineral estate which they will hold upon termination of Gulf's 50-year fixed-term lease on July 14, 1975. Undoubtedly El Paso is attempting to analogize the situation in this case to the situation where a lessee selling gas to an interstate pipeline voluntarily transfers his working interest to a third party who must obtain certification and continue the sale unless abandonment authorization is approved by the Commission. However, the Commission rejected a similar "suggestion" in *Bass* stating (48 F.P.C. at 1276):

[42] As pointed out in footnote 3, *supra,* El Paso takes no position as to how the Commission should resolve the controversy which is the subject of El Paso's petition.

> "The Commission recognizes the legal requirement that when an assignment of a lease occurs, the successor steps '* * * into the shoes of a predecessor [and] takes the properties * * * subject to any benefits and infirmities inherent therein'. *Graridge Corp., et al,* Opinion No. 408, 30 FPC 1156 at 1162. Shell took the James Ranch Lease subject to the infirmity that it could not sell Bass' gas, or bind Bass to a gas sales contract."

[335] The same rationale applies in this case because Gulf-Warren could not sell the gas attributable to the mineral estate of Mineral Interest Owners or bind them to its gas sales contracts with El Paso.

Further, El Paso's "suggestion" is patently fallacious because upon termination of Gulf's leasehold estate on July 14, 1975, there will be nothing for Gulf to transfer to Mineral Interest Owners. It is an elementary rule of property law that for Gulf to "effectuate a transfer" Gulf must have a property right to convey. Upon expiration of the 50-year term lease, Gulf will have no right, title or interest in the minerals underlying that acreage and, therefore, will have no right which could be transferred or conveyed. This result necessarily follows from the fact that an oil and gas lease is a determinable fee which upon termination, for whatever reason, automatically vests the absolute fee simple title in the owner of the mineral estate less whatever minerals have been produced and marketed.[43] In this case Gulf's leasehold estate will simply cease to exist on July 14, 1975 at which time the fee simple title to the mineral estate will automatically vest in Mineral

[43] *Duke* v. *Sun Oil Co.,* 320 F.2d 853, 858 (5th Cir. 1963).

Interest Owners. In light of the decision in *Gulf Oil Corp.* v. *Southland Royalty Co., supra,* Gulf could not prevent this vesting since it will have no residual legal interest in the lease.[44] For the same reason, upon termination of its lease, Gulf will have no interest which it could transfer to Mineral Interest Owners. Thus, no "transfer by reversion" will take place over which the Commission could exercise its abandonment authority, even assuming that jurisdiction over such a transfer existed.[45]

[336] El Paso also suggests that Warren may not reduce sales of residue gas to El Paso without prior Commission approval.[46] The short answer to this "suggestion" is that although there will be a reduction in the actual volumes of residue gas delivered to El Paso after July 14, 1975, there will be no reduction in the volumes which Warren contracted to sell to El Paso

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[44] *See Haby* v. *Stanolind Oil & Gas Co.,* 228 F.2d 298, 305 (5th Cir. 1955), in which the court held the equitable rule against forfeiture could not be applied to a terminated lease since upon termination the lessee had no interest which could be forfeited.

[45] Clearly the Commission has no jurisdiction under the Natural Gas Act to determine when or whether a mineral leasehold estate terminates. These are matters of state property law which are the exclusive concern of the courts where the property lies. *Sunderland* v. *U.S.,* 266 U.S. 226, 232-233 (1924). In this case, the Supreme Court of Texas has determined that Gulf's leasehold estate terminates on July 14, 1975. *Gulf Oil Corp.* v. *Southland Royalty Co., supra.* For the Commission to contravene this decision by holding that such lease did not terminate unless and until Gulf obtained Section 7(b) abandonment authorization would constitute an impermissible attempt to extend its authority to areas of purely local concern.

[46] El Paso does not cite the statutory authority for any such Commission approval but presumably El Paso is referring to Section 7(b) abandonment authorization.

and which the Commission certificated to be sold under such contract." As previously detailed, the contracts between Warren and El Paso did not and could not include any volumes of gas attributable to the mineral estate of Mineral Interest Owners. Thus, there will be no reduction in the volumes of gas covered by and dedicated under the Warren-El Paso contracts and under the related certificates issued by the Commission and, therefore, it is clear that Warren is not required to obtain any type of "prior Commission [337] authorization."[47] However, even if Warren or Gulf is required to obtain some type of Commission authorization because of the termination of Gulf's fixed-term leasehold estate on July 14, 1975, there would be no effect on the unrelated right of Mineral Interest Owners to commence sales to Intratex of gas attributable to their mineral estate without obtaining Section 7(b) abandonment authorization. In other words, since neither Gulf nor Warren ever owned or sold gas attributable to the mineral estate

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[47] In its petition, El Paso acknowledged that after July 14, 1975 Warren will continue to deliver to El Paso 35,000 Mcf per day of "surplus residue gas" in accordance with the subject contracts. Similarly, it should be noted that Gulf will continue delivering gas to Warren although there will be a reduction in the volumes delivered after July 14, 1975, i.e., Gulf will not cease deliveries to Warren.

[48] The reason that Warren requires no "prior Commission authorization" to reflect the reduction in the actual volumes of gas delivered to El Paso on or after July 14, 1975 is analogous to the situation where there is a reduction in deliveries by an interstate seller due to the depletion of one or more wells on acreage covered by a certificated contract but deliveries of gas continue from the remaining wells. The same is true with respect to Gulf's deliveries to Warren.

of Mineral Interest Owners, sales of gas to Intratex from such mineral estate are completely separate from and independent of any Commission authorization or permission which Warren or Gulf may have to obtain because of the termination of Gulf's leasehold estate.

Conclusion

For the foregoing reasons, Mineral Interest Owners submit that the Commission should find and declare that Mineral Interest Owners are not required to obtain any prior Commission authorization in order to commence sales to Intratex of gas attributable to the mineral estate they will hold on termination of Gulf's lease on July 14, 1975. Any different result would be in irreconcilable conflict with the D. C. Circuit's decision in *Mobil Oil Corp.* v. *F.P.C., supra;* would require the Commission to overrule its decision in *El Paso Natural Gas Co.* v. *Perry R. Bass, supra;* and would [338] contravene the decision of the Supreme Court of Texas in *Gulf Oil Corp.* v. *Southland Royalty Co., supra.*

Respectfully submitted,

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[339]

EXHIBIT A

Mineral Interest Owners

Percentage Ownership of Mineral Estate
(Calculated on Acreage Basis)

	% Ownership
Southland Royalty Company	47.0
William Y. Penn, *et al.*, Trustees, Nancy Elizabeth Penson, Penn Resources, Inc., Elizabeth Hudson Penn	8.6
Trustees Under the Will of Warren Wright, Deceased	25.7
Total Mineral Interest Owners	81.3
Other Mineral Owners	18.7
TOTAL	100.00

[340]

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

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[341]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

IN THE MATTER OF:

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO, INC.

(FILED JUNE 20, 1975)

Initial Brief of Mitchell Energy Corporation

Mitchell Energy Corporation ("Mitchell") pursuant to the Federal Power Commission's ("Commission") "Notice of Extension of Time and Revision of Briefing Schedule" issued in the above-captioned proceeding on June 5, 1975, respectfully submits this initial brief.

I.

STATEMENT OF ISSUES

Mitchell hereby adopts the statement of issues as submitted by Mineral Interest Owners in its brief in this proceeding. The threshold issue is whether parties who succeed to an interest in natural gas producing acreage which interest has not previously been committed to interstate commerce are obliged to continue the service previously rendered to an interstate carrier until granted the right to abandon the facili-

ties used to render such service by the Commission pursuant to section 7(b) of The Natural Gas Act ("Act").

Should the Commission decide that the new interest owners are so obligated, then it becomes imperative that the nature and extent of the service to be rendered be correctly defined.

[342]

II.

Argument

Mitchell respectfully submits that the Commission's Opinion No. 733 issued June 11, 1975, is erroneous insofar as it seeks to exercise jurisdiction over any reserves not connected to facilities rendering jurisdictional service. Before the Commission can compel the continuation of a service pursuant to its abandonment authority under section 7(b), it must be demonstrated that the service in question is within the jurisdiction conferred upon the Commission by the Act. In the long history of defining the jurisdictional characteristic of facilities used for the sale for resale of natural gas in interstate commerce, one prerequisite has been paramount—no Commission jurisdiction attaches until the natural gas flow in interstate commerce has commenced. As the Tenth Circuit stated in *Saturn Oil & Gas Co.* v. *FPC*, 250 F.2d 61, 68 (10th Cir. 1957), *cert. denied*, 355 U.S. 956 (1958):

> "Until there is a sale of natural gas produced by such operations and installations in interstate commerce for resale, they are exempt. In the event of such a sale, the jurisdiction of the Com-

> mission applies but only because of the sale and only to the extent that the Natural Gas Act confers jurisdiction."

This jurisdictional limitation has been recently acknowledged by the Commission in Opinion No. 638 * wherein the power and scope of section 7(b) were described as follows:

> "Section 7(b) operates for the protection of the interstate market, by requiring Commission action before (1) jurisdictional facilities can be abandoned by the facilities owner, and (2) service rendered by means of such facilities [343] can be abandoned. Section 7(b) has never been interpreted to reach beyond these two express areas of concern; and certainly the language chosen by Congress is clear enough on its face to militate against the expansion of our 7(b) powers. (Footnote omitted)
>
> "The legislative history of Section 7(b) of the Act adequately demonstrates that it was the intent of Congress to preclude the cessation of jurisdictional service or the removal of the necessary facilities to provide such service once it had authorized the Commission absent authorization permitting its termination." *

This jurisdictional limitation has been recognized by the Commission and affirmed by the courts. In *J.*

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* *El Paso Natural Gas Co.* v. *Perry R. Bass*, 48 FPC 1269 (1972).

* Hearings before the House Subcommittee on Interstate and Foreign Commerce, April 2, 1936, page 124.

M. Huber Corp.[*] the Commission adopted the position that the jurisdictional language of the Act, rather than the contractual language, establishes the jurisdiction over the service rendered by a natural gas company. This holding was affirmed by the Third Circuit.[*] Huber was engaged in the sale of natural gas to an interstate pipeline under a contract which required the sale and purchase of all the natural gas produced by Huber from certain acreage. Huber, dissatisfied with the price, sought to discontinue the sales, and to withdraw a certificate application pending before the Commission. Twelve wells were involved. Eleven of the twelve were attached to an interstate gathering system and one was attached to the pipeline's pumping station, where all gas delivered was consumed intrastate. The Commission held, and the court approved, that the eleven wells from which the gas flow had commenced to the gathering system were within the Commission's jurisdiction; thus, the certificate was issued and abandonment was denied. [344] The last well, from which no gas had flowed in interstate commerce, was found not to be within the Commission's jurisdiction.

Mitchell submits that the jurisdiction of the Commission to compel the continuation of any service is coterminus with the facilities used to render that service. Any undiscovered, undeveloped reserves clearly fall beyond the jurisdiction of the Commission and require the same treatment as the one intrastate well noted in the *Huber* case. The *Huber* doctrine clearly

[*] 14 FPC 340 (1955).

[*] *J. M. Huber Corp.* v. *FPC*, 236 F.2d 550 (3rd Cir. 1956), *cert. denied*, 352 U.S. 971 (1957).

demonstrates that unconnected reserves are beyond the Commission's jurisdiction under section 7. To demonstrate the anomoly of this situation, consider the situation where a pipeline purchaser complains that a producer has illegally abandoned service. Where the abandoned service is alleged to be from facilities from which gas has flowed in interstate commerce, the Commission under *Huber* need only order that the facilities and service be restored. However, where the alleged abandoned service is the failure to deliver from "dedicated" but undiscovered or undeveloped reserves, the Commission's only recourse is to order development. This is precisely the authority that has been denied by the section 1(b) exemption of production and gathering from the jurisdiction of the Commission.[*]

In the present proceeding, it is within the Commission's jurisdiction to require any successors to facilities now within the Commission's jurisdiction to continue to provide service now provided by such facilities until such time as the abandonment is authorized pursuant to section 7(b). It is wholly outside the grant of authority under section 1(b) of the Act for the Commission to require that any other reserves be sold to interstate commerce from any further development.

[345] WHEREFORE, Mitchell respectfully requests that the Commission render a declaratory judgment compelling continuation of service from all jurisdictional facilities rendering service to the interstate

[*] *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 602-603, *Lone Star Gathering Co.*, 28 FPC 683 (1962).

market on July 14, 1975, and specifically acknowledging the Commission's lack of jurisdiction to compel the sale in interstate commerce from any other facilities.

Respectfully submitted,

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Its Attorney

June 20, 1975

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

[346] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

IN THE MATTERS OF

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

(RECEIVED JUNE 20, 1975)

Initial Brief of Texaco Inc.

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[347] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

IN THE MATTERS OF

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

Initial Brief of Texaco Inc.

Texaco Inc. (Texaco) hereby files its Initial Brief in these proceedings pursuant to Section 1.29 of the Federal Power Commission's (Commission) Rules of Practice and Procedure (Title 18 C.F.R. 1.29).

I.

STATEMENT OF THE CASE

On January 20, 1975 El Paso Natural Gas Company (El Paso) filed in Docket No. CP75-209 a petition for a declaratory order to resolve, in essence, one question concerning gas production from property currently subject to a lease held by Gulf Oil Corporation (Gulf) and others, which lease will expire on July 14, 1975. At that time all mineral rights, including the right to natural gas production, shall vest in the reversionary mineral interest owners, including Exxon Corporation (Exxon) and a group of companies collectively referred to in this case as Mineral Interest Owners.

Gulf is currently making percentage-type sales of casinghead gas to Warren Petroleum Company, a Division of Gulf Oil Corporation (Warren) from the above-mentioned property in Crane County, Texas.

Warren in turn sells the surplus residue gas from its Waddell Gasoline Plant to El Paso, which ultimately resells the gas in interstate commerce.

[348] On April 8, 1975, Texaco field in Docket No. CI75-594 its petition for a declaratory order, which petition sets forth facts that are identical in all material respects to the facts set forth in El Paso's petition. Gulf holds a 50-year fixed term oil and gas lease covering certain property in Ector County, Texas. When this lease expires on August 7, 1975, Texaco's rights to 25 percent of the minerals as a reversionary mineral interest owner shall vest, and such rights include the right to natural gas production.

Gulf is currently making percentage-type sales of casinghead gas from its Ector County leasehold to Phillips Petroleum Company (Phillips). Phillips then sells the residue gas from the tailgate of its Goldsmith Plant to El Paso, which resells the gas in interstate commerce.

In its June 3, 1975 order to consolidate proceedings the Commission recognized similarity both in the underlying facts and in the legal question presented by Texaco's petition and El Paso's petition.

II.

ISSUE

Texaco's petition for declaratory order states the fundamental issue which is raised both by itself and by El Paso's petition for a declaratory order. That issue is whether a lessee, by making an interstate gas sale, can commit more than its real property interest

(*i.e.*, its rights under its lease), thereby both encumbering forever the real estate and imposing upon the nonparticipating mineral fee owner the obligations of Section 7 of the Natural Gas Act.

III.

Argument

It is Texaco's firm position that the above-stated issue must be answered in the negative. As a royalty owner, [349] Texaco is in no way a party to the present contract by which Gulf sells production from the Ector County property to Phillips. Neither is Texaco a party to the residue gas sales contracts through which Phillips sells gas from the Goldsmith Plant to El Paso. This being the case, Texaco has never directly or indirectly consented to or acquiesced in the commitment by Gulf and Phillips of their gas to an interstate disposition. When the 50-year term of Gulf's lease on the Ector County property expires on August 7, 1975, Gulf's leasehold estate and Texaco's royalty interest will be extinguished, and Texaco as the owner of an unleased one-fourth mineral interest will become the owner of all operating rights in such interest.

It is also clear that Exxon and Mineral Interest Owners, as the reversionary interest owners of the property covered by Gulf's lease on the Crane County property, should in no way be bound by the lessee's actions or by that lease when it expires on July 14, 1975. These reversionary interest owners, like Texaco with the Ector County property, should be free to do as they choose with their share of gas production upon expiration of the lease.

As set forth in its petition for declaratory order, Texaco adopts all arguments made by Exxon and by Mineral Interest Owners in their respective pleadings dated March 3, 1975. Exxon's pleading at page 2 states that the "thrust of El Paso's argument would be that it, in some manner, acquired a right to purchase that which Gulf had no right to sell." Exxon correctly asserts that it would be deprived of its property without due process of law in violation of the Fifth Amendment to the United States Constitution if Exxon were required to deliver involuntarily its gas to El Paso after expiration of the issue. Likewise, Texaco's Constitutional rights would be violated if it were forced to sell to El Paso after Gulf's lease in Ector County terminates. As stated at 16 Am.Jur. 2d 946, "Substantive due process may be roughly defined as the constitutional guaranty that no person shall be deprived of his life, liberty, or property for arbitrary reasons. . . ." Since Texaco [350] has a vested mineral fee interest that will become absolute and unencumbered on August 7, 1975, it would be an orbitrary and unconscionable deprivation of property to require Texaco to sell its gas to any given purchaser.

Gulf, in its Docket No. CI75-594 pleading dated May 9, 1975, demonstrated that it will not need to obtain abandonment upon expiration of its lease on the Ector County property. Gulf therein mentions that it sells gas from such lease to Phillips, and that Texaco has the same legal position as Exxon and Mineral Interest Owners "as described in the pleadings of said parties filed in Docket No. CP75-209." No abandonment authorization need be obtained by

Texaco, Gulf or Phillips in order for Texaco to make a different disposition of its gas upon termination of the Ector County lease. The discussion at page 5 of Exxon's pleading, explaining why Warren will not require any abandonment authority concerning gas from the Crane County lease, is equally applicable in showing why Phillips will need no abandonment authorization concerning gas from the Ector County lease.

Both Exxon and Mineral Interest Owners have adequately demonstrated that no abandonment by anybody would be necessary or proper when Gulf's lease in Crane County terminates. There will be no transfer of rights for the Commission to consider when Gulf's leases in Crane County and Ector County expire, for the leasehold estates will vanish, and the reversion will occur by operation of law. To argue that any abandonment authorization would be required before Texaco could make a new disposition of its share of gas from the Ector County property upon expiration of the lease would be to argue that state law concerning passage of title must be overturned and revolutionized. The fact that the Commission has no jurisdiction under the Natural Gas Act to determine when or whether a mineral leasehold estate terminates is mentioned in the March 3, 1975 pleading of Mineral Interest Owners on page 19, footnote 46.

Strong additional support for finding that the Commission lacks authority to adjudicate matters of title [351] can be found in the Tenth Amendment to the United States Constitution. That amendment, as interpreted in *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64 (1938), reserves to the states all powers

not given to the federal government by the Constitution. At 304 U.S. 78 the Court held:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

It is also established that the "tenure, transfer, control and disposition of real property are matters which rest exclusively with the state where the property lies. . . ." (*Sunderland* v. *United States,* 266 U.S. 226 at 232-33 (1924)). Since there is no expressed or implied power given to the federal government by the Constitution to interfere with the traditional authority of the states to adjudicate passage of title to real property, the federal government has no such power. If the contrary were true, it would then be impossible for anyone to be certain of his rights under any mineral deed. For example, if the Commission should determine here that the abandonment provisions of Section 7 of the Natural Gas Act attach to real property itself, rather than the legal interest held by the party committing gas to interstate commerce (*i.e.,* the leasehold interest), land

titles will become encumbered in perpetuity. State statutes of limitations serve the valid public policy purpose of clearing land titles after prescribed periods of time of possession by the land owner. Yet, these state laws would apparently be thwarted by the intervention of [352] a new and novel federal common law concept of property, *i.e.*, Section 7 of the Act. Such a result would definitely not be in the public interest, and it was clearly not intended by the passage of the Natural Gas Act. Furthermore, this result is prohibited by the Fifth and Tenth Amendments to the United States Constitution, as demonstrated above.

WHEREFORE, Texaco urges the Commission to hold that a lessee, by making an interstate gas sale, cannot commit more than its real property interest (*i.e.*, its rights under its lease), the result of such holding to be that no abandonment authorization for any party will be necessary or appropriate in regard to gas production from the Ector County property upon termination of Gulf's lease on August 7, 1975, regardless of what disposition is made of the gas at that time.

Respectfully submitted,

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[353] (CERTIFICATE OF SERVICE OMITTED IN PRINTING)

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[354]

BEFORE THE
FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

Reply Brief of the Commission Staff

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Washington, D.C.
June 25, 1975

[355]

BEFORE THE
FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

Reply Brief of the Commission Staff

I. INTRODUCTION

This reply brief is filed pursuant to the order of the Commission issued June 3, 1975, as modified by notice issued June 13, 1975, in the above entitled proceeding. Staff's position remains fundamentally unchanged from that stated in its initial brief. However, in view of the arguments in the initial briefs filed, *inter alia*, by Texaco Inc. (Texaco), Mineral Interest Owners, Exxon Corporation (Exxon) and Mitchell Energy Corporation (Mitchell), Staff hereby replies with additional argument. Any issue not discussed in this reply brief is considered by staff to have been treated adequately in its initial brief.

II. ARGUMENT

A. *The recent Commission decision in Opinion No. 733 supports staff's position.*

Mitchell has taken the opportunity in its initial brief to reargue the decision of the Commission in Opinion No. 733, *Mitchell Energy Corporation*, issued June 11, 1975, in Docket No. CI75-296. The contentions advanced by Mitchell in its initial brief in this proceed-

ing have been adequately treated by the Commission in Opinion No. 733.

[356] Aside from dispensing with Mitchell's arguments, Opinion No. 733 reveals a trend in Commission thinking that is particularly relevant to the instant proceeding. Opinion No. 733 is another in a sequence of cases [1] which place the disposition of the gas paramount over the contractual positions of the parties exercising control over the gas. *Mitchell* holds that all gas, whether presently discovered or not, remaining on the acreage now owned by a successor (Mitchell) was, and still is, dedicated to the interstate market in spite of the fact that the original contract dedicating such gas has now expired. Like *Cumberland* and *Blair-Vreeland* before it, *Mitchell* demonstrates that in order to ensure an adequate flow of gas in interstate commerce producers succeeding to an interest in dedicated gas cannot take it out of interstate commerce without Commission consent under Section 7(b) of the Natural Gas Act. In the instant proceeding, the position advocated by Staff in its initial brief is consistent with this precedent.

B. *A Commission order holding Reversioners subject to the provisions of Section 7(b) of the Natural Gas Act would not violate Reversioners' Fifth Amendment rights.*

Briefs submitted by Exxon and Texaco urge that a Commission order consistent with the position advocated by staff would constitute a deprivation of Rever-

[1] See Opinion No. 467, *Cumberland Natural Gas Company*, 34 FPC 132 (1965) and Opinion No. 724, *Blair-Vreeland*, issued March 18, 1975 (53 FPC —), in Docket No. CI74-331.

sioners' property without due process of law in violation of the Fifth Amendment to the Constitution. This constitutional argument raised by Reversioners is without merit. The mere requirement that Reversioners are subject to the provisions of Section 7(b) does not deprive them of property without due process of law. Section 7(b) makes specific provision for a hearing, and in any event Revesioners will ultimately be compensated for their gas at no less than the just and reasonable rate as determined by the Commission.

[357] Nevertheless, it is said that there will be a deprivation of Reversioners' right to determine freely the disposition of their production. Fundamental to the alleged Fifth Amendment violation is the assumption that production from the acreage after the expiration of the subject leases is somehow distinct, for purposes of dedication, from gas produced prior to lease expiration. Armed with that distinction, Reversioners claim that they have a right to dispose of "their production" as they choose unburdened by Commission regulation. As set forth in its initial brief, Staff rejects the initial premise that "Reversioners' gas" is distinct from the rest of the gas underlying the subject leases and is not dedicated to interstate commerce. In fact, the reserves Reversioners will control have been dedicated to interstate commerce and are therfore, subject to the Commission's regulation under its statutory mandate including Section 7(b) of the Natural Gas Act. For the good of the public the rights of Reversioners must give way to the authority of Congressional legislation in matters such as these pertaining to the flow of gas in interstate commerce. In the words of the Supreme Court, "The Fifth Amendment . . . is not a

guarantee of untrammeled freedom of action and of contract. In the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable."[2]

C. *Reversioners' other arguments are likewise without merit.*

It is generally argued by Texaco, Exxon and Mineral Interest Owners that there has been no voluntary commitment by Reversioners of the subject gas so no question of a need for abandonment authority can arise. Staff sees this as the heart of the issue in this proceeding and so takes the liberty to reiterate some of the argument made in its initial brief.

[358] Reversioners, or their predecessors in interest, once held the gas under the subject leases free to dispose of it without restriction. They freely chose to lease the right to produce and dispose of the gas. Thereupon Lessees dedicated that production to interstate commerce. As Mineral Interest Owners point out at page 10 of their initial brief, ". . . gas may only be dedicated to the interstate market to the extent that the seller has authority to dispose of the gas involved." Because production and sale was not limited under the subject leases and Lessees dedicated the entire reserves, the gas that will revert to the interest of Reversioners is committed to the interstate market and permission and approval pursuant to Section 7(b) must precede an abandonment of that commitment.

Mineral Interest Owners and Texaco contend that there can be no "transfer by reversion" over which the

[2] *Virginia Railway Roofing Company* v. *System Federation*, 300 U.S. 515, 558 (1937).

Commission could exercise its abandonment authority. Whether or not Lessees effectuate a "transfer," the end result remains that Reversioners will succees to an interest in gas reserves that have been dedicated to interstate commerce. Like Lessees before them Reversioners are then subject to the provisions of Section 7(b).

Texaco and Exxon further argue that a holding that Reversioners are subject to the provisions of Section 7(b) unlawfully usurps the states' power to determine title to property and forces Reversioners to sell gas to El Paco. To the contrary, there is no question here as to title to the gas nor is there an intent to force a new sale of gas. Reversioners' arguments misstate the intended purpose of Section 7(b) which is to ensure that gas once dedicated may not be diverted from that dedication unless dictated by the public convenience or necessity. In their attempt to make fine distinctions in property rights Reversioners have lost sight of the overriding consideration—the disposition of the gas.

[359] D. *Commission Regulations compel the conclusion that Lessees and Plant Operators are not subject to the constraints of Section 7(b).*

There have been as many different conclusions as there have been briefs filed with regard to the questions whether Lessees and Plant Operators must seek permission and approval pursuant to Section 7(b) to abandon the subject sales upon expiration of the leases. Aside from staff's brief, however, the initial briefs have failed to consider in the instant context the effect of the Commission's Regulations. Staff continues to believe that under the applicable Regulations Lessees

and Plant Operators are not bound to make Section 7(b) applications for abandonment permission and approval upon the expiration of the subject leases.

III. Conclusion

For the reasons set forth herein and in its initial brief Staff urges a Commission decision declaring that after the expiration of the subject leases the requirement to seek permission and approval pursuant to Section 7(b) before diverting the subject gas from its dedicated market applies to Reversioners but does not apply to Lessees or Plant Operators.

Respectfully submitted,

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Edward R. Mark

/s/ George H. Williams, Jr.
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Washington, D.C.
June 25, 1975

[360] (Certificate of Service Omitted in Printing)

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[361] UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Docket No. CP75-209

El Paso Natural Gas Company

Docket No. CI75-594

Texaco Inc.

(Received June 30, 1975)

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[366] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO, INC.

Reply Brief of El Paso Natural Gas Company

EL PASO NATURAL GAS COMPANY ("El Paso") pursuant to Section 1.29 of the Commission's Rules of Practice and Procedure [1] and in accordance with the briefing schedule established herein, respectfully submits this reply brief in the above-styled and docketed proceeding.

I.

INTRODUCTION

This proceeding is a consolidation of two proceedings involving the issue of the necessity for abandonment authorizations pursuant to Section 7(b) of the Natural Gas Act ("Act') as a result of the forthcoming expiration of two 50-year fixed term oil and gas leases.[2] The factual background has been fully set forth in El Paso's Initial Brief in this proceeding.

[1] 18 C.F.R. Section 1.29 (1974).

[2] The lease in Docket No. CP75-209 covers property located in Crane County, Texas, and expires on July 14, 1975. (Hereinafter to be referred to as the "Waddell lease.") The lease in Docket No. CI75-594 covers property in Ector County, Texas, and expires on August 7, 1975. (Hereinafter to be referred to as the "Goldsmith lease.")

II.

ARGUMENT IN REPLY

I. Southland, *et al.*[3] must obtain abandonment authorization in order to discontinue sales of natural gas dedicated to interstate commerce by Gulf, *et al.*[4]

[367] Mineral Interest Owners,[5] Exxon Corporation ("Exxon')", and Texaco Inc. ("Texaco"), all reversionary mineral interest owners under the two 50-year fixed term leases in question and all included in the reference Southland, *et al.*, contend in their initial briefs that they are not required to obtain abandonment authorization under Section 7(b) before initiating sales of gas for resale in intrastate commerce. They claim that the gas attributable to their mineral interests has never been dedicated to interstate commerce and that they therefore do not come within the Commission's jurisdiction. However, Southland, *et al.* must obtain abandonment authorization before sales to El Paso may cease and sales to intrastate purchasers commence.

A. *Mobil Oil Corp.* v. *FPC,* holding that the Commission does not have jurisdiction over conventional landowner royalty holders, is not disposi-

[3] "Southland, *et al.*" refers to all of the reversionary interest owners under both the Waddell and Goldsmith leases.

[4] "Gulf, *et al.*" refers to all current lessees under both the Waddell and Goldsmith leases.

[5] Mineral Interest Owners include Southland Royalty Company, William Y. Penn, *et al.*, Trustees, and Trustees Under the Will of Warren Wright.

tive of the Commission's jurisdiction over Southland, *et al.*

To come within the jurisdiction of the Commission under the Natural Gas Act, one must be engaged in the interstate sale of natural gas for resale or in the transportation of gas in interstate commerce. 15 U.S.C Section 717(b). Mineral Interest Owners contend that during the lease term they are merely holders of a royalty interest and as such are not sellers of natural gas according to the decision of the United States Court of Appeals for the District of Columbia in *Mobil Oil Corp.* v. *FPC,* 463 F.2d 256 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 976 (1972). Since they are not sellers of natural gas they claim that they are not subject to the Natural Gas Act, in particular Section 7(b).

Whether or not Southland, *et al.* have been sellers of natural gas during the terms of the Waddell and Goldsmith leases, it is a fact that Gulf, *et al.* have been sellers in interstate commerce of natural gas produced from the acreage covered by those leases. Upon termination of the leases, Southland, *et al.*,'s reversionary mineral interest owners, will succeed to Gulf, *et al.*'s interest in the leases. Southland *et al.* must take this interest subject to the prior dedication of the gas by Gulf, *et al. See Cumberland Natural Gas Co.,* 34 F.P.C. 132 (1965).

B. Since all the natural gas acreage covered by the Waddell and Goldsmith leases has been dedicated to interstate commerce, Southland, *et al.* are subject to Section 7(b) whether or not they originally initiated sales of gas from the dedicated acreage.

[368] Mineral Interest Owners, Exxon, and Texaco claim that none of the gas attributable to their reversionary interests has been dedicated to interstate commerce since their interests will not come into being until the expiration of the leases in question. Furthermore, they claim they cannot be bound to the sale of natural gas in interstate commerce by Gulf, *et al.* since they never consented to this disposition of the gas.

However, the Commission looks to the history of the producing acreage to determine whether natural gas has been dedicated to interstate commerce. *See Blair-Vreeland,* Op. No. 724, —— F.P.C. ——, (issued March 18, 1975); *Mitchell Energy Co.,* Op. No. 733, —— F.P.C. ——, (issued June 11, 1975). During the term of the lease, Gulf, *et al.* have had all possessory interests in the gas produced, including full right of sale. *Mobil Oil Corp.* v. *FPC, supra.* As a result of their sales of the gas produced for resale in interstate commerce, they dedicated all the natural gas from the acreage covered by the leases to interstate commerce. It is well settled that once dedicated, gas must remain in interstate commerce until the Commission gives abandonment authorization. *Sunray Mid-Continent Oil Co.* v. *FPC,* 364 U.S. 137 (1960).

The important factor is the physical movement of the gas. *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965). The gas from the acreage covered by the Waddell and Goldsmith leases has physically flowed in interstate commerce. The change in ownership of the acreage as a result of the termination of the leases cannot interrupt the jurisdictional flow of the gas.

Mineral Interest Owners state that the Commission cannot compel the initiation of jurisdictional sales. The point here, however, is that jurisdictional sales were initiated at the time that the natural gas attributable to these leases began to flow into El Paso's interstate pipelines. The Natural Gas Act compels the continuation of that activity. *United Gas Pipe Co.* v. *FPC*, 350 F.2d 689, 692 (5th Cir. 1965), *aff'd.* 385 U.S. 83 (1966). Without Commission abandonment authorization, Southland, *et al.* are compelled to continue sales of natural gas to El Paso for resale in interstate commerce.

C. *El Paso Natural Gas Co.* v. *Perry R. Bass* is not dispositive of the issue as to whether Southland, *et al.* need obtain abandonment authorization.

Mineral Interest Owners claim that because of the Commission's decision in *El Paso Natural Gas Co.* v. *Perry R. Bass*, 48 F.P.C. 1269 (1972), they are not required to obtain Section 7(b) authorization in order to cease sales to El Paso and divert the gas for resale in intrastate commerce. As pointed out in El Paso's initial brief, however, the situation in *Bass* was vastly different from the present situation.

[369] In *Bass*, the producer diverted the gas attributable to his working interest from one interstate pipeline company to another interstate pipeline company. The gas was never removed from the interstate market. In the present case, however, Mineral Interest Owners have already arranged to sell the gas attributable to their interest to an intrastate pipeline for resale in intrastate commerce.[6] Thus, the instant proceeding deals with the public interest in maintaining the flow of interstate gas, whereas *Bass* did not.

Furthermore, *Bass* dealt with a farmout agreement whereas the instruments involved in the instant proceeding are fixed term leases. In supporting its decision in *Bass*, the Commission stressed that "[f]armouts serve the public interest, for they are means whereby an available drilling site is placed with a person having available risk capital to the end that the site is explored. Without farmout arrangements, exploration will be limited, for exploration would then occur only when there is a coincidence of site availability and exploration risk capital in one producer." *Id.* at 1277. The Commission felt that if abandonment authorization were required of the producer, "[t]he future use of farmout agreements in the natural gas producing industry would be discouraged,"

[6] Mineral Interest Owners have agreed to sell to Intratex Gas Company ("Intratex") the gas attributable to the fee simple mineral estate they will hold on July 14, 1975, following the termination of Gulf's leasehold estate in the Waddell lease. Intratex, an intrastate buyer of gas, is a wholy-owned subsidiary of Houston Natural Gas Corporation, a distributor of gas in the City of Houston, Texas, and environs. (Mineral Interest Owners Initial Brief p. 3.)

a result "clearly contrary to the public interest." *Id.* at 1278.

However, the instruments involved in this case, fixed term leases, do not particularly serve the public interest. In fact, on page 4 of their initial brief, Mineral Interest Owners point out that "[s]uch term oil and leases now are extremely rare, in fact almost unique . . . and . . . 'of not practical importance' in Texas. Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas,* 7 Tex. L. Rev. 1, 15 (1928)." Thus, in contrast to the *Bass* situation, requiring abandonment authorization in this instance would not pose a threat to the public interest by impeding existing patterns of trade or usage in the gas industry.

Also, in *Bass,* Shell and Bass explicitly agreed that Shell was to sell no gas attributable to Bass' working interest. Therefore, the Commission found that Bass was not bound by Shell's sale of natural gas for resale in interstate commerce. On the other hand, during the term of the lease, Gulf, *et al.* had the authority to and did dedicate *all* of the gas produced from the acreage covered by the leases to interstate [370] commerce. Southland, *et al.* are subject to this prior dedication and must not cease sales of natural gas for resale in interstate commerce without Commission authorization.

D. Requiring abandonment authorization of Southland, *et al.* will not deny them of their constitutional rights.

Texaco and Exxon claim that if they must obtain abandonment authorization prior to selling the gas attributable to their interests to the buyers of their choice, they will be deprived of their property without due process of law in contravention of the Fifth Amendment. El Paso contends that no unconstitutional deprivate will occur.

El Paso does not dispute the ownership of the natural gas produced from the acreage covered by the leases. El Paso admits that *Gulf Oil Corp.* v. *Southland Royalty Co.,* 496 S.W.2d 547 (Tex. 1973), settled the issue as to when the Waddell lease will terminate. Southland, *et al.* will own the property including the natural gas produced therefrom upon expiration of the Waddell lease. Texaco and Exxon will in no way be deprived of their rightful property interests.

However, El Paso does contend that Texaco and Exxon are subject to the prior dedication of the gas attributable to their interests to interstate commerce. It has been well settled by the Supreme Court of the United States that a gas flow, once jurisdictional, remains so until Section 7(b) abandonment authorization has been obtained from the Commission. *Sunray Mid-Continent Oil Co.* v. *FPC, supra; California* v. *Lo-Vaca Gathering Co., supra.* The natural gas produced from the acreage which will revert to Exxon and Texaco has been dedicated to interstate commerce by the actions of the lessees. To require that Texaco and Exxon obtain abandonment authorization before

removing the gas from its interstate flow does not deprive them of their constitutional rights but merely requires that they comply with a constitutionally valid scheme to which they are subject.

II. Gulf, *et al.* may not terminate their sales of natural gas without first obtaining abandonment authorization from the Commission.

Gulf argues that as a lessee producer it could sell and dedicate to interstate commerce no more than the natural gas attributable to its own interest and that since its interest terminates with the expiration of the two leases in question, it will have no more gas to sell and does not need to obtain Section 7(b) authorization before ceasing sales of natural gas for resale in interstate commerce. It is El Paso's contention that since Gulf has dedicated to interstate commerce all the gas produced from the acreage covered by the leases, it must continue to supply this gas for resale in interstate commerce. Dedication implies a continuing duty to provide service which cannot be abrogated by means of private arrangement but only by Commission authorization pursuant to [371] Section 7(b) of the Natural Gas Act. *Hunt* v. *FPC*, 306 F.2d 334 (5th Cir. 1962), *rev'd on other grounds*, 376 U.S. 515 (1964).

A. To hold that Gulf, *et al.* are required to obtain abandonment authorization before they may cease their present sales of natural gas for resale in interstate commerce would not contravene a decision of local property law.

Mineral Interest Owners, in their contention that Gulf, as lessee producer, is not required to obtain

Section 7(b) authorization before terminating its present sales of natural gas for resale in interstate commerce, state that for the Commission to hold otherwise would be to contravene a decision of local property law, something clearly outside the Commission's jurisdiction. It is El Paso's position that *Gulf Oil Corp.* v. *Southland Royalty Co., supra,* in which the Supreme Court of Texas held that the Waddell lease terminates on July 14, 1975, at which time the mineral interests thereunder revert to the reversionary interest owners, does not affect the requirement that Section 7(b) authorization be obtained before present sales of natural gas for resale in interstate commerce may cease.

Gulf Oil Corp. v. *Southland Royalty Co., supra,* dealt with the issue of title, a question of local property law. Nowhere in the opinion does the court attempt to determine the duties of the parties under the federal regulatory scheme of the Natural Gas Act or the jurisdiction of the Commission. Furthermore, the duties of the lessees and the jurisdiction of the Commission are not affected by that decision. "The intention of Congress cannot be conclusively determined by reference to concepts and classifications under state law decisions normally disposing of 'private' controversies." *Mobil Oil Corp.* v. *FPC, supra,* at 259. Certainly, the decision of the Texas Supreme Court did not make an exception in this instance to the established principle that a gas flow, once jurisdictional, remains so until abandonment is authorized.

B. Section 154.91 of the Commission's Regulations under the Act requires that Gulf, *et al.* as producers making percentage-type sales are subject to Section 7(b) of the Act.

Section 154.91(e) imposes the requirements of Section 7(b) of the Act upon producers making percentage-type sales to plant operators selling gas in interstate commerce.[7] Gulf, *et al.* clearly fall within Section 154.91(e) for they have been making percentage-type sales to Phillips, a plant operator who is making sales of gas in interstate [372] commerce and who is thereby subject to the certificate requirements of the act. Thus, to cease such sales to Phillips, Gulf must obtain abandonment authorization pursuant to Section 7(b). *See Bill J. Graham, et al.*, Docket No. CI75-626, *et al.*, —— F.P.C. ——, (issued June 16, 1975).

Before the merger of Gulf and Warren in 1971, Gulf also made percentage-type sales of natural gas to Warren. It is noteworthy that if neither Gulf nor Warren are required to obtain abandonment authorization before ceasing their current sales of natural gas for resale in interstate commerce, such mergers could become a way of avoiding Commission regulations. The producer-seller does not have to obtain a certificate to make percentage-type sales to the plant operator. 18 C.F.R. Section 154.91(d). If the Commission decides herein that the plant operator, who makes sales of surplus residue gas in interstate com-

[7] Section 154.91(e) has been judicially confirmed. *See* Sun Oil Co. v. FPC, 256 F.2d 233 (5th Cir. 1958), *cert. denied*, 358 U.S. 872 (1958).

merce, is not required to obtain abandonment authorization before reducing its sales, the percentage-type seller and the plant operator, could divert the casinghead gas originally sold in interstate commerce for resale to unregulated intrastate commerce without first having to obtain any authority under Section 7(b) by merging themselves into one entity as Gulf and Warren have done. Such a result would leave a dangerous gap in the federal regulatory scheme.

C. The decision of the Commission in *El Paso Natural Gas Co.* v. *Perry R. Bass* does not alleviate the necessity that Gulf, *et al.* obtain abandonment authorization before terminating their present sales of natural gas for resale in interstate comerce.

Both Gulf and Exxon, in their initial briefs are of the opinion that because the Commission in *El Paso Natural Gas Co.* v. *Perry R. Bass, supra,* did not find that Shell, as a prior working interest owner, was required to obtain abandonment authorization, neither should the Commission find that Gulf, *et al.* is so required. This conclusion does not follow for two reasons.

The Commission in *Base* never dealt with the issue of whether Shell was required to obtain abandonment authorization. The only issue in that proceeding was whether Bass had to obtain Section 7(b) authorization before selling the gas attributable to his reconveyed 50 percent working interest to a different interstate pipeline company for resale in interstate commerce. Just because Bass was authorized to dispose of the gas to another purchaser without abandonment

approval, it does not necessarily follow that no requirement could be imposed on Shell to prevent this disposition.

In fact, Shell was subject to and did comply with all necessary Commission requirements at the time the 50 percent working interest was reconveyed to Bass. Shell filed a notice of partial cancellation of its rate schedule to reflect Bass' conversion of his overriding royalty [373] interest to a one-half working interest. *El Paso Natural Gas Co.* v. *Perry R. Bass, supra.* Since Gulf, *et al.* fall within Section 154.91(d) of the Commission's Regulations, they were not required to file rate schedules and thus could not file for a partial cancellation. On the other hand, Gulf, *et al.* are subject to Section 7(b) of the Act and thus must file for abandonment authorization. 18 C.F.R. Section 154.91(e) (1974); *Bill J. Graham, et al., supra.*

III. Waren and Phillips may not reduce their sales in interstate commerce of residue natural gas to El Paso, the present level of which is attributable in large part to production from the leases in question, without prior Commission authorization.

Gulf makes the argument that since Warren's contract with El Paso is only for the sale of "surplus residue gas available for sale" no abandonment approval is needed if reduced sales are merely the result of reduced supplies 'available for sale" (Gulf Initial Brief p. 4). As stated in its initial brief, El Paso does not contend that mere fluctuations in the amounts of surplus residue gas sold by Warren and Phillips to El Paso require abandonment authorization. How-

ever, permanent reductions in sales of natural gas presently flowing in interstate commerce do require abandonment approval. The diversion of natural gas produced from the Waddell and Goldsmith leases upon the termination of those leases will result in a permanent, substantial reduction in the sales of gas by Warren and Phillips to El Paso.

Once natural gas has become jurisdictional, it cannot cease to be so as the result of either prior or subsequent agreements between the parties. *California* v. *Lo-Vaca Gathering Co., supra.* "The service . . . is distinct from the contract." *Sunray Mid-Continent Oil Co.* v. *FPC, supra.*, at 153. The gas sold by Warren and Phillips to El Paso for resale in interstate commerce has been dedicated to interstate commerce. Despite the nature of the contract, once dedication has occurred, the service may not be permanently reduced without prior abandonment authorization.

IV. The public interest requires that abandonment authorization be obtained before sales to the current purchaser may cease.

As stated *supra,* fixed term leases are little used instruments in contrast to the widespread use of farmout agreements as indicated by the Commission in *Bass.* Moreover, the public interest in the continued use of farmouts as a means of encouraging exploration and development of natural gas fields, far outweighs any public interest in the use of fixed term leases. If, however, abandonment authorization is not required of the parties to the instant proceeding, such fixed term leases might become prevalent as a means to thwart the Commission's jurisdiction. It is not dif-

ficult to imagine a situation in which a short term, fixed term lease might be used at a time when there is no available intrastate [374] market for the natural gas produced from the acreage covered by the lease. The lessees would sell the gas to the available interstate market. Upon termination of the lease, however, the reversionary interest owners could choose for themselves whether to sell the gas interstate or intrastate depending upon which market would be the most profitable. No one would be required to obtain abandonment authorization and the gas would pass from under the Commission's jurisdiction.

Such a situation is unthinkable and would make a sham of the goals of the Natural Gas Act, particularly those of Section 7(b). To allow the requirements of Section 7(b) to be so easily avoided, would certainly not advance the public interest in "stability and continuity of service' which "[t]he proscription of abandonment without prior Commission approval was designed to ensure." *Farmland Industries* v. *Kansas-Nebraska Natural Gas Co.*, 349 F.Supp. 670, 680 (D.Neb. 1972), *aff'd.* 486 F.2d 315 (8th Cir. 1973). El Paso repeats its position that an abandonment authorization proceeding is necessary to develop the important public interest considerations involved, especially in this time of critical natural gas shortage, before the gas involved in this proceeding may be diverted from the interstate markets served by El Paso.

IV.

Conclusion

Wherefore, for the foregoing reasons, El Paso Natural Gas Company respectfully requests that the Commission hold that sales of natural gas presently being sold for resale in interstate commerce may not cease as the result of the termination of two 50-year fixed term leases without prior Commission authorization pursuant to Section 7(b) of the Natural Gas Act.

Respectfully submitted,

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[377] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket Nos. CP75-209, *et al.*

El Paso Natural Gas Company, *et al.*

(Filed June 25, 1975)

Reply Brief of Exxon Corporation

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[378] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket Nos. CP75-209, *et al.*

EL PASO NATURAL GAS COMPANY, *et al.*

Reply Brief of Exxon Corporation

I

These consolidated proceedings involve requests for a declaratory order determining whether abandonment authority is required either by the mineral fee owners or their lessees upon the expiration of certain 50-year fixed term oil and gas leases. Exxon Corporation is one of the mineral fee owners under a 50-year fixed term oil and gas lease with Gulf Oil Corporation (Gulf). In its initial brief, Exxon demonstrated that neither it nor its lessee, Gulf, is required to obtain abandonment authority at the end of the lease term. Such a requirement would improperly result in Exxon's being denied the full enjoyment of its mineral fee estate at least expiration and thus deprive it of its property without due process of law in violation of the Fifth Amendment of the Constitution. Moreover, abandonment authorization cannot be required of a service never undertaken.

Exxon has received the initial briefs of the Commission Staff, El Paso Natural Gas Company (El Paso), The People of the State of California and the Public Utilities Commission of the State of California(California), Gulf Oil Corporation (Gulf), the "Mineral Interest Owners", and Texaco Inc. Of these parties, Staff Counsel, El Paso, and California con-

tend that Exxon, as a mineral fee owner, requires abandonment authority at the end of the lease term. They argue that this requirement arises as a result of Exxon's "succession", when the lease expires, to the interests of Gulf which has sold production from its leasehold estate in interstate commerce to El Paso. They further argue that the "public interest" requires this result. We shall deal with their arguments that Exxon requires abandonment authorization topically.[1]

[379] ## II

ARGUMENT

A. There Is No Succession By Exxon To The Interests Of Gulf Upon Lease Termination.

In their initial briefs, Staff Counsel, El Paso, and California argue that Exxon requires abandonment authority upon lease termination before it can sell production from its mineral fee estate to someone other than El Paso because, at that time, Exxon will succeed to the interests of Gulf which has sold production from its leasehold estate in interstate com-

[1] California and El Paso also contend that Gulf requires abandonment authority upon lease expiration. Although Staff Counsel agrees with this result, he maintains that no abandonment application is actually required by Gulf due to his belief that Exxon would be a successor-in-interest to Gulf when the lease expires and the fact that Section 2.64 of the Commission's Rules excuses the filing of an abandonment application where a succession-in-interest is involved. Since only five days has been allotted between the filing of initial briefs and the filing of reply briefs, Exxon has determined to limit this reply brief to the arguments which would require it to obtain abandonment authority. It assumes that Gulf will reply to the arguments that it would require abandonment authorization.

merce to El Paso. This argument has no merit because there is no succession by Exxon to the interests of Gulf at lease expiration.

As Exxon pointed out in its initial brief, when the 50-year fixed term lease expires, Gulf's leasehold estate is simply extinguished. Exxon is not a producer here. When the lease expires Exxon is vested by operation of law with its fee interest in the mineral estate. *Gulf Oil Corp.* v. *Southland Royalty Co.* 496 S.W.2d 547 (1973). Thus there is no succession, or any other form of develovement, by Exxon to the interests of Gulf when the lease expires.

The opposing parties' apparent misapprehension of the legal status of Exxon's interest is rooted in their refusal to acknowledge that Exxon's mineral fee estate and Gulf's leasehold estate are entirely separate and distinct property rights. This distinction is not a 'fiction" as suggested by Staff Counsel. As lessee, Gulf is precluded by the most fundamental tenets of property law from committing or encumbering the fee interests of its lessor, Exxon. No specific prohibition is required in the lease, as suggested by these opposing parties, because Gulf is precluded by law from committing Exxon's mineral fee interests unless Exxon specifically authorized Gulf to do otherwise, and no such authorization was granted.

By attempting to paper over the distinction between Exxon's and Gulf's respective property rights, the opposition seek to obtain Exxon's private property which has never been dedicated to interstate commerce. Exxon has never delivered any production from its mineral fee estate in interstate commerce.

When the lease expires, it will not succeed to Gulf which has made deliveries from its leasehold estate. Because Exxon's property interests are wholly separate from Gulf's property interests, Exxon's mineral fee estate is free of any interstate commitment when the lease expires.

United Gas Improvement Co. v. *Continental Oil Co.*, 391, 392, 1965, cited by the opposing parties is clearly not applicable here. That case merely stands for the proposition [380] that parties, once having voluntarily undertaken an activity, could not avoid Commission jurisdiction over that activity by arguing that state law construed their sale of gas in-place to constitute a transfer of leases. The parties had committed their property to interstate commerce but sought to avoid jurisdiction on the basis of a technicality of state law. In this case the rationale of *FPC* v. *Niagra Mohawk Power Corp.* (347 U.S. 239 1954) controls. There, the court held that the Power Act did not abolish state laws which created property rights. Thus, the Commission could not affect a taking of such property rights simply be refusing to recognize the state laws by which they were created. Similarly, here, the Commission cannot, under the Natural Gas Act, deprive Exxon of its mineral fee interest by ignoring, as the opposing parties urge, the state law by which such interest is established.

The *Mitchell* [2] and *Blair-Vreeland* [3] cases cited by the opposition do not support their succession argu-

[2] Mitchell Energy Corporation, Docket No. CI75-296, Opinion No. 733, issued June 11, 1975.

[3] Blair-Vreeland, Docket No. CI74-331, Opinion Nos. 724 and 724-A, issued March 18, 1975, and May 14, 1975, respectively.

ment. These cases both involve the acquisition by a producer of all or a portion of the leasehold interests of another producer which has sold production from such interests in interstate commerce. Under the Commision's *Grayridge* Doctrine,[4] the acquiring producer succeeds to the interests of its predecessor subject to the predecessor's prior interstate commitment.

Here, the situation is quite different. Exxon is not a successor-in-interest to Gulf under the lease. Instead, Exxon, as Gulf's lessor, was the creator of Gulf's leasehold interests. Whereas the acquiring producer had to take its predecessor's interests as it found them, Exxon takes nothing from Gulf. Exxon's interests are separate and distinct from Gulf's and consequently totally unaffected by them upon lease expiration.

The Commission, itself, recognized in *Blair-Vreeland* that the relationship of lessor-lessee is quite different from the predecessor-successor relationship in a succession situation. In that case (Op. 724-A, pp. 4-5), the Commission distinguished its holding in *Bass*[5] on the very basis that whereas a successor producer acquires its interests subject to the interstate dedication of its predecessor, a lessor's [381] interests are not affected by the interstate dedication of its lessee of its leasehold interests. Clearly, the mineral fee interests of Exxon, as lessor, have not been committed by the dedication of the limited leasehold interest by its lessee, Gulf.

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[4] The Grayridge Corporation, 30 FPC, 1156 (1963).

[5] El Paso Natural Gas Co. v. Perry R. Bass, 48 FPC 1269 (1972).

Finally, the holdings of the *Mitchell* and *Blair-Vreeland* support rather than refute Exxon's position. In those cases, the Commission relied upon the predecessor producer's contract to determine both the extent of the dedication and its correlative abandonment jurisdiction. The Commission concluded that abandonment authority was required before the successor producer could devote the interests it acquired to another use, but only if the predecessor had committed those interests under an interstate contract. Here, Gulf's two surplus residue agreements with El Paso committed production only to the extent of Gulf's leasehold interests. By law, Gulf could do no more. Since Gulf's contracts with El Paso do not, because they could not, cover Exxon's production from its mineral fee interest after expiration of the leasehold interest, no abandonment authority is required by Exxon to devote production from its mineral interest to another use.

B. *"Public Interest" Does Not Create Jurisdiction Where It Does Not Exist.*

Staff Counsel, El Paso and California all contend that the "public interest" requires that the Commission assert jurisdiction over Exxon's production from its mineral fee estate. They make this contention after acknowledging that this case is really one of first impression. However, Commission jurisdiction cannot be created in the name of "public interest" when it does not in fact already exist by statute. Close examination reveals that the opposing parties' so-called "public interest" argument is nothing more than a refuge of last resort when legal and logical analysis has failed.

In any event, the D.C. Circuit definitively settled this issue by rejecting the Commission's assertion of jurisdiction over lessor-royalty owners in the name of the "public interest" in *Mobil Oil Corporation* v. *FPC*, 482 F.2d 256 (D.C. Cir. 1972). There, the Court stated (463 F.2d at 263):

> "If the statutory use of 'seller' or 'sale' of natural gas in interstate commerce is referable to the meaning of these words in ordinary usage, or as likely understood by Congress, the FPC's ruling is clearly unsound. We do not think a different result warranted or mandated on the ground that the purpose of the Act is to protect the ultimate beneficiaries against exploitation by natural gas companies. That was indeed the objective of Congress, see FPC v. [382] Hope Natural Gas Co., 320 U.S. 591, 610, 64 S.Ct. 281, 88 L.Ed. 333 (1944). The FPC is to be commended for attempting to further that objective, but it is not sufficient justification upon which to base an expansion of the Act to activities clearly not within its terms. Congress did not give the FPC carte blanche to take whatever action it might consider appropriate in furtherance of this purpose. The FPC is limited by the provision establishing its jurisdiction, and we do not find in that provision, rooted as it is in a sale in interstate commerce, any basis for reaching out to cover the landowner's lease or its royalty payments. We think it too far removed from the interstate sale. When there is a sale of gas to a pipeline in interstate commerce, the FPC will of course have

> the jurisdiction and the responsibility to exercise control in the interest of the ultimate consumer."

III

Conclusion

Wherefore, Exxon reaffirms its prayer in its initial brief that the Commission declare that its production from the mineral fee estate has not been dedicated and that no abandonment authority is required when the lease expires.

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[383] (Certificate of Service Omitted in Printing)

[384] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

(RECEIVED JUNE 27, 1975)

Reply Brief of Mineral Interest Owners

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[386] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

Reply Brief of Mineral Interest Owners

Mineral Interest Owners[1] submit the following reply to the initial briefs filed in the captioned case by El Paso Natural Gas Company (El Paso), the California Public Utilities Commission (California) and the Commission Staff (Staff).

PRELIMINARY STATEMENT

As recognized by Staff, the controlling issue in this case "no matter how it is phrased" is whether Mineral Interest Owners must obtain Section 7(b) abandonment authorization before initiating sales to the purchaser of their choice[2] of the gas attributable to the fee simple mineral estate they will hold following the termination on July 14, 1975 of the 50-year fixed-term oil and gas lease held by Gulf Oil Corporation (Gulf) on approximately 46,000 acres in Crane County, Texas. The answer to this controlling question depends on

[1] The Mineral Interest Owners on whose behalf this Reply Brief is filed are listed on Exhibit A to their Initial Brief.

[2] Mineral Interest Owners have elected to sell their gas to Intratex Gas Company, an intrastate buyer of gas, which is a wholly owned subsidiary of Houston Natural Gas Corporation, a distributor of gas in the City of Houston, Texas and environs.

whether the gas attributable to such mineral [387] estate of Mineral Interest Owners has somehow been dedicated by Gulf to the interstate market, i.e. to El Paso. In this connection, it is undisputed that Gulf has not undertaken to dedicate such gas to El Paso.[3]

As detailed in their initial brief, it is the position of Mineral Interest Owners that in light of *Mobil*,[4] *Bass*,[5] and *Blair-Vreeland*[6] there has been no dedication of gas attributable to the mineral estate which they will hold on termination of Gulf's lease on July 14, 1975. Therefore, Mineral Interest Owners are not required to obtain Commission authorization in order to commence sales of such gas.

Staff claims that this position "is based upon the *fiction* that there is a distinction for purposes of dedication between gas from the same reserve produced before and after the expiration of a lease" (Br. 5). In the same vein, El Paso argues that the applicability of Section 7(b) to sales of gas by Mineral Interest Owners cannot be avoided because of "technical concepts of local law" (Br. 11). The short answer to these

[3] As noted in Gulf's initial brief at p. 4:

> It is Gulf's position that in neither case did it purport to dedicate the gas to El Paso which it will not own after expiration of the leases, and that had it attempted to do so, any such dedication would have been ineffective as a matter of law.

[4] *Mobil Oil Corp.* v. *F.P.C.*, 463 F.2d 256 (D.C.Cir.1971), *cert. denied*, 406 U.S. 976 (1972).

[5] *El Paso Natural Gas Co.* v. *Perry R. Bass*, 48 F.P.C. 1269 (1972).

[6] Opinion Nos. 724 and 724-A, *Blair-Vreeland*, Docket No. CI74-331, issued March 18, 1975 and May 14, 1975, respectively.

claims is that Mineral Interest Owners [388] are not relying on any "fiction" or upon "technical concepts of local law"; instead, our position is predicated on basic property rights which cannot be altered through the "fiction" of applying Section 7(b) so as to force Mineral Interest Owners to make sales to El Paso of gas attributable to their reversionary mineral interest. As the Commission noted in *Bass*:

> The thrust of El Paso's argument is that El Paso in some manner acquired a right to purchase that which Shell had no right to sell. We will not so alter the basic property rights of mineral owners through the fiction of Section 7(b) application. (48 F.P.C. at 1276)

While admitting that term leases are "now extremely rare,"[7] El Paso *et al* argue that in light of the present day gas shortage it is in the public interest for the Commission to hold that Section 7(b) applies to sales of gas attributable to the mineral estate of Mineral Interest Owners. Yet it is clear that the desire to keep gas in the interstate market does not create Commission jurisdiction under the Natural Gas Act. In *Mobil,* Judge Leventhal rejected a similar attempt to expand Commission authority stating (463 F.2d at 263):

> We do not think a different result warranted or mandated on the ground that the purpose of the Act is to protect the ultimate beneficiaries against exploitation by natural gas companies. That was

[7] Staff Br. 8. El Paso characterizes term leases as "little used, impractical instruments" (Br. 21).

> indeed the objective of Congress, see FPC v. Hope Natural Gas Co., 320 U.S. 591, 610, 64 S.Ct. 281, 88 L.Ed 333 (1944). The FPC is to be commended for attempting to further that objective, but it is not sufficient justification upon which to base an expansion of the Act to activities clearly not within its terms. Congress did not give the FPC [389] carte blanche to take whatever action it might consider appropriate in furtherance of this purpose. The FPC is limited by the provision establishing its jurisdiction, and we do not find in that provision, rooted as it is in a sale in interstate commerce, any basis for reaching out to cover the landowner's lease or its royalty payments.

At the outset we should also point out that the initial briefs of El Paso *et al,* are sprinkled with correct, but completely irrelevant, statements of law. Thus, Staff states (Br. 6):[8]

> It is well established there can be no withdrawal of gas *once dedicated* to the interstate market from continued interstate movement without permission of the Commission under Section 7(b). (Emphasis supplied)

No one can argue with this statement, but the controlling question in this case is whether gas attributable to the mineral estate of Mineral Interest Owners has been dedicated to the interstate market. Obviously, if gas attributable to their reversionary mineral interest

[8] California makes almost the identical statement (Br.3), while El Paso's brief contains numerous statements of law which simply have no applicability to the controlling issue to be decided by the Commission in this case (Br.10, 11, etc.)

has been dedicated to the interstate market, Mineral Interest Owners cannot remove such gas from the interstate market without first obtaining abandonment authority pursuant to Section 7(b). On the other hand, if no such dedication of their gas has occurred, then Section 7(b) clearly does not apply and Mineral Interest Owners are free to make a sale of such gas to a purchaser of their choice.

[390] Since many of the arguments advanced by El Paso *et al* do not detract from the initial brief of Mineral Interest Owners, the Commission is referred to the appropriate sections of such brief in order to avoid unnecessary repetition. This reply will be limited to a discussion of the fundamental errors in the claims by El Paso *et al* that the gas attributable to the mineral estate of the Mineral Interest Owners has been dedicated to interest commerce and to the lack of merit in the futile attempts of El Paso *et al* to avoid application in this case of the principles enunciated in *Bass*. We see no reason to respond to the arguments of El Paso *et al* based on various successor-in-interest cases.[9] Their reliance on such decisions is obviously misplaced because in those cases the issue before the Commission was whether the assignee of a previously dedicated leasehold interest was bound by such dedication. In those cases there was no question that the assigned leasehold interest had been previously dedicated. By contrast, in this case, the controlling question is whether gas attributable to the leasehold estate of Mineral In-

[9] *Blair-Vreeland, supra;* Opinion No. 408, *Graridge Corp. (Operator) et al*, 30 F.P.C. 1156 (1963); Opinion No. 733, *Mitchell Energy Co.*, Docket No. C175-296, issued June 11, 1975.

terest Owners has ever been dedicated.[10] We do feel constrained to mention that [391] one of the successor-in-interest cases cited and relied upon by El Paso *et al* is the original order (Opinion No. 724) in *Blair-Vreeland*. However, they have completely ignored the order on rehearing (Opinion No. 724-A) in that case. Their omission of any reference to this order on rehearing is understandable because the Commission therein reaffirmed the *Bass* doctrine stating:

> . . . In *Bass* the question was not what Bass could bestow on Shell, but what Bass in fact did bestow [on Shell] by way of a farmout agreement. Bass retained a 1/8th override convertible into a 1/2 working interest after payout of the cost of drilling the well to Shell. Shell attempted to dedicate 100% of the gas [to El Paso] and the commission held that the gas to which Bass was entitled (1/2) was not dedicated because it was never owned by Shell. (Application, pp. 10-11) (Opinion 724-A at p. 4)

Similarly, in this case the question before the Commission is whether Gulf's dedication to El Paso of gas

[10] Nor do we see any reason to reply to Staff's succession to control argument (Br. 10-11) which also assumes that the gas reserves attributable to the mineral estate of Mineral Interest Owners "have been dedicated to interstate commerce". Staff's phrase "succession to control" evidently stems from a recognition by Staff that Mineral Interest Owners are not successors in interest to Gulf. We do not know what Staff may be implying by this new term, but regardless of phraseology, under settled Texas law, upon termination of Gulf's leasehold estate on July 14, 1975, Mineral Interest Owners will hold a fee simple title to their pro rata share of the mineral estate underlying the subject acreage. *Gulf Oil Corp.* v. *Southland Royalty Co.*, 496 S.W.2d 547 (Tex. Sup.Ct. 1973)

attributable to Gulf's fixed term leasehold interest included or is binding upon the gas attributable to the mineral estate which Mineral Interest Owners will hold on July 14, 1975. Since Gulf had no legal right to dedicate the gas of Mineral Interest Owners and has expressly disclaimed any intention of so doing, we believe that the principles enunciated in *Bass* and reiterated in *Blair-Vreeland* on rehearing are dispositive of the decision to be issued by the Commission in this case.

We have also ignored El Paso's arguments that Gulf, as lessee, and Warren Petroleum Company, as plant operator and seller under contracts with El Paso, are required to obtain abandonment authorization. These arguments erroneously assume that Gulf-Warren have the right to make sales to El Paso of gas which is owned by Mineral Interest Owners. However, Gulf-Warren have no such right; upon the termination of Gulf's fixed term lease, it will have sold (and [392] El Paso will have bought) all the gas Gulf ever had the right to sell. Moreover, even if for technical reasons Gulf or Warren should be required to make some type of abandonment or rate schedule filing because of the termination of Gulf's fixed-term lease, these filings are unrelated to and have no effect on the right of Mineral Interest Owners to make sales of gas attributable to the mineral estate they will hold on termination of Gulf's lease on July 14, 1975.

Argument

A. Gas Attributable to the Mineral Estate of Mineral Interest Owners Has Not Been Dedicated to Interstate Commerce

1. *Staff*

Quite frankly, we have difficulty in following the rationale urged by Staff to support its argument that the gas attributable to the mineral estate of Mineral Interest Owners has been dedicated to interstate commerce.[11] Staff points out (Br. 6) that the gas attributable to Gulf's fixed-term leasehold interest was sold for resale to El Paso and, therefore, is dedicated to interstate commerce. Staff then contends (Br. 6) that Gulf has dedicated to El Paso gas attributable to the mineral estate of Mineral Interest Owners because (i) Gulf was restricted "neither as to the amount of gas which may be sold from the subject acreage nor as to the area from which gas may be produced on the subject acreage," and (ii) there is "no question" that Gulf "had authority to sell all the gas from the reserves within the fixed term of the lease" (Br. 6). The basic fallacy in [393] Staff's argument is that in *Gulf Oil Corp.* v. *Southland Royalty Co., supra,* the Texas Supreme Court held that Gulf only had a property right in and title to the volume of gas which could be found and produced from the subject acreage prior to July 14, 1975; therefore, Gulf was restricted both as to the

[11] Staff argues that "The gas produced from the subject acreage after lease expiration is dedicated to interstate commerce" (Br. 6). We assume that Staff necessarily does not intend to include any gas now being produced from such acreage and sold to intrastate purchaser(s).

amount of gas it could sell from the subject acreage and as to its authority to sell gas produced from such acreage. As of July 14, 1975, Gulf will have exhausted its property rights to any gas produced from the subject acreage and title to any remaining gas will vest in Mineral Interest Owners.[12] In essence, Staff's arguments boils down to nothing more than a contention that Gulf's contract with and sale of gas to El Paso had the effect of dedicating to El Paso gas attributable to the mineral estate of Mineral Interest Owners even though Mineral Interest Owners were not parties to the Gulf-El Paso gas contract and could not have prevented its execution, and even though Gulf never intended by such contract to sell to El Paso the gas attributable to the mineral estate of Mineral Interest Owners. In *Bass,* the Commission rejected rationale similar to that urged in this case by Staff stating:

> Neither party can be heard to say that the gas contract can function to impair the pre-existing title of Bass, who was not a party to the gas contract and who could not have prevented its execution. El Paso's rights to purchase gas from the James Ranch Well can rise no higher than Shell's to sell that gas, yet El Paso seeks that result by its claim that it is entitled to purchase Bass' gas until this Commission orders [394] otherwise. Shell obtained its working interest by lease assignment

[12] Even if it is assumed that Gulf had "authority to sell all the gas from the reserves within the fixed term of the lease" there is no evidence that Gulf exercised such authority. Indeed, as previously noted, in its initial brief Gulf expressly disclaims any intention "to dedicate the gas to El Paso which it (Gulf) will not own after expiration of the leases."

> from Bass. The Commission recognizes the legal requirement that when an assignment of a lease occurs, the successor steps '. . . into the shoes of his predecessor [and] takes the properties . . . subject to any benefits and infirmities inherent therein.' *Graridge Corp., et al.,* Opinion No. 408, 30 FPC 1156 at 1162. Shell took the James Ranch lease subject to the infirmity that it could not sell Bass' gas, or bind Bass to a gas sales contract. (48 F.P.C. at 1276)

Nor is there any validity to Staff's attempt to equate the present situation to "An artificial cut-off in time in the dedication of gas reserves to the interstate market in deference to the terms of a lease . . ." (Br. 6) As the Supreme Court of Texas held in *Gulf Oil Corp.* v. *Southland Royalty Co., supra,* there was nothing "artificial" about the limited property right which Gulf had in any gas produced from the subject acreage. Moreover, before there can be any cut-off in the dedication of gas reserves to the interstate market, there must first have been a dedication of such gas reserves to the interstate market. Thus, Staff's argument begs the controlling question to be decided by the Commission in this case, i.e., whether gas attributable to the mineral estate of Mineral Interest Owners has been dedicated to interstate commerce.

Likewise, Staff's reliance (Br. 7) on *Hunt* v. *FPC,* 306 F.2d 334 (5th Cir. 1962)[13] is misplaced. In *Hunt,* Judge Brown merely noted that when a producer voluntarily commences deliveries under a temporary cer-

[13] *Reversed on the other grounds* 376 U.S. 515 (1965).

tificate, it is irrevocably committing to interstate commerce the gas attributable to his leasehold interest until the underlying gas reserves are exhausted or until the Commission permits [395] abandonment pursuant to Section 7(b).[14] It would be sheer sophistry to claim that *Hunt* holds that whenever the owner of an undivided leasehold interest commences deliveries of gas attributable to his interest in interstate commence, the entire gas reserve, including the interests of other undivided interest owners, becomes dedicated to interstate commerce.

Apparently in desperation, the Staff conjures up a chamber of regulatory horrors which will occur unless the Commission holds that the gas attributable to the mineral estate of Mineral Interest Owners has been dedicated to interstate commerce. Thus, Staff states (Br. 7-8)

> "Limiting reserve dedication to the term of a lease would allow lessors to usurp the function of the Commission and frustrate the purpose of Section 7(b) by entering into short-term leases, leases terminable at will, and bilateral agreements with lessee-producers to agree to minimize production dedicated to interstate market until the lease expires at which time they may avail themselves of higher intrastate prices."

[14] Under the ordinary oil and gas lease a producer has the right to produce gas "down to the exhaustion of the reserve" i.e., so long as gas is produced in paying quantities. 3 WILLIAMS & MEYERS, OIL & GAS LAW § 601.4 (1962). However, in this case we are not dealing with the ordinary oil and gas lease but an "extremely rare" fixed term lease.

There is not one iota of evidence to support Staff's speculation. To the contrary, historical practice has shown that lessees are not willing to enter into term leases.[15] That is why such term leases are "extremely rare"[16] and "little [396] used."[17] Moreover, there certainly is no evidence that as to any existing fixed-term leases, particularly the fixed-term leases involved in this case, there are bilateral agreements under which the lessee-producer (Gulf) has minimized production dedicated to the interstate market until the lease expires so as to take advantage of higher intrastate prices. The clear and unequivocable evidence in this case shows that after July 14, 1975 Gulf will have no interest in the gas attributable to the mineral estate of Mineral Interest Owners. Under such circumstances, Gulf has every economic incentive to maximize production of gas from the subject acreage prior to July 14, 1975.

Proceeding from sheer speculation to mindreading, Staff finally argues (Br. 8) that when the subject fixed term lease was executed approximately 50 years ago on July 14, 1925, it was "considered likely in the minds of the original parties to the lease" that there would be no gas remaining at the end of the 50 year fixed term provided in the lease. While Mineral Interest Owners do not profess to know what is in the minds of other parties today, much less 50 years ago, we would speculate that the original parties to Gulf's lease did not know whether any gas would ever be found much

[15] See footnote 10 on page 4 of the Initial Brief of Mineral Interest Owners

[16] Staff Br. 8.

[17] El Paso Br. 21.

less whether there would be gas remaining at the end of the 50 year lease term. Nevertheless, we do know from this lease[18] that the parties provided that Gulf would only have a property right in and title to the gas which it could find and produce prior to July 14, 1975. Since Gulf never owned any gas produced from the subject acreage from and after July 14, 1975, Gulf clearly could not sell or dedicate such gas to El Paso and consequently El Paso acquired no right to purchase that which Gulf had no right to sell or dedicate.

[397] 2. *El Paso*

Mineral Interest Owners are also confused (if not mystified) by El Paso's arguments which, for the most part, are directed to the question of whether Gulf and Warren are required to obtain abandonment authorization. It is clear, however, that El Paso now takes the firm position that gas attributable to the mineral estate of Mineral Interest Owners is "bound" by Gulf's prior dedication of natural gas attributable to Gulf's leasehold interest.

It appears that the primary thrust of El Paso's argument is to classify Mineral Interest Owners as successors in interest to Gulf. However, there is no factual or legal foundation to support this classification because (a) the fee simple mineral estate which Mineral Interest Owners will hold on July 14, 1975 will not be obtained as a result of an assignment of Gulf's leasehold interest which will cease to exist at that time, (b) Mineral Interest Owners were not par-

[18] A copy of this lease is attached to El Paso's petition as Exhibit A.

ties to the Gulf-El Paso gas contract and could not have prevented its execution, and (c) Gulf took the fixed term lease subject to the infirmity that it could not sell any gas found and produced after July 14, 1975 and could not bind the owners of such gas to a gas sales contract. In short, as in *Bass,* El Paso seeks in this case to acquire the right to purchase gas which Gulf had no right to sell. The infirmities in El Paso's arguments were clearly revealed by the Commission in *Bass* and need not be repeated.

To further support its position, El Paso argues that the dedication of natural gas to interstate commerce is *in rem* rather than *in personam* (Br. 14). Assuming El Paso's argument is correct, it does not support the results it seeks. Here the *"rem"* was gas attributable to Gulf's leasehold interest i.e. gas which could be found and produced prior to July 14, 1975. Gulf could not and did not sell or dedicate anything more than this *"rem."* Prior to July 14, 1975, all of this "rem" will have been delivered to interstate commerce and thus Gulf's dedication will be fulfilled.

[398] 3. *California*

California does little more than reiterate in summary form the arguments made by Staff and El Paso. For example, California relies upon the physical movement of gas in El Paso's pipeline to support a claim of dedication of gas attributable to the mineral estate of Mineral Interest Owners. However, this claim is clearly without merit because there has been no physical movement of any such gas. Indeed, since the right of such Mineral Interest Owners to market any gas attributable to their mineral estate will not even come into be-

ing until July 14, 1975, no gas attributable to such mineral estate could have been previously delivered by Gulf.

California's reliance on *Sunray Mid-Continent Oil Co.*, 364 U.S. 137 (1960) is equally misplaced. In that case, the Supreme Court held once dedicated to interstate commerce, gas reserves may not be removed from interstate commerce without abandonment authorization. But the question to be decided in this case is whether gas attributable to the mineral estate of Mineral Interest Owners has ever been dedicated to interstate commerce.

In conclusion California presents what is perhaps the most puzzling of all arguments urged by El Paso *et al.* First, California impliedly recognizes that under the D.C. Circuit's decision in *Mobil,* the Commission has no jurisdiction over gas attributable to the mineral estate which Mineral Interest Owners will hold on July 14, 1975 (Br. 5-6). Then after referring to the Supreme Court's decision in *Sunray*[19] and *Lo-Vaca*[20] and "the current natural gas situation" California argues that "both law and public [399] policy dictate that the *Mobil* case should not be applied." (Br. 6) However, if the Commission should still feel bound to follow *Mobil,* California claims that as in the *Rayne Field* case[21] "the agreements involved in the instant proceeding are such that they are very close in economic effect to conventional sales of natural gas." (Br. 6)

[19] *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965).

[20] *Sunray Mid-Continent Oil Company* v. *FPC, supra.*

[21] *U.G.I.* v. *Continental Oil Co.*, 381 U.S. 392 (1965).

California concludes then that Mineral Interest Owners "are better categorized as royalty owners engaged in the sale of natural gas in interstate commerce for resale, and therefore come within the purview (of) Section 1(b) of the Natural Gas Act." (Br. 6)

The defects in this amazing argument are readily apparent. First, we fail to perceive how "the current natural gas situation" or the Supreme Court's decisions in *Lo-Vaca* and *Sunray* dictate in any way that the D.C. Circuit's decision in *Mobil* should be disregarded in this case. Moreover, we fail to understand what "agreements" in this case are "very close in economic effect to conventional sales of natural gas." Judge Levanthal made it crystal clear in *Mobil* that as royalty owners under the fixed term lease held by Gulf, Mineral Interest Owners cannot be considered sellers of gas.[22] On the other hand, if California is referring to the gas contract between El Paso and Gulf, its argument is without merit because Mineral Interest Owners were not parties to that contract, could not have prevented its execution and, according to Gulf, such contract was never intended to cover the gas attributable to the mineral estate of Mineral Interest Owners.

[22] Thus, Judge Leventhal stated (463 F.2d at 262):

> To refer to the royalty owner as engaging in the sale is to depart from the common understanding of the words used, industry parlance, economic equivalent, or any other foundation hitherto considered a source for discerning Congressional intention.

[400] **B. The Attempts Of El Paso Et Al To Distinguish Bass Are Without Merit**

El Paso *et al* recognizes that if the principles enunciated in *Bass* are applied in this case, there can be no doubt that the Commission has no jurisdiction over gas attributable to the mineral estate of Mineral Interest Owners and on July 14, 1975 they will be free to sell such gas to the purchaser of their choice without obtaining any type of prior permission or authority from the Commission.

Accordingly, Staff argues (Br. 9-10) that "*Bass* can hardly be said to be controlling over the instant questions" because in *Bass* the gas was sold to another interstate pipeline while in this case Mineral Interest Owners propose to sell their gas to an intrastate pipeline. El Paso and California also seek to distinguish *Bass* on this basis."[23] The short answer to these attempts to distinguish *Bass* is that it is clear that the Commission's decision in that case was not based upon whether the purchaser to whom Bass sold his gas was an interstate or intrastate pipeline. Instead, the issue was whether gas attributable to Bass' interest had been dedicated to El Paso by Shell. Having found that the gas was not dedicated to El Paso the Commission had no authority to compel Bass to sell gas attributable to its interest to a particular purchaser.[24] Thus, the ultimate destination of the gas to be sold by Bass was necessarily irrelevant to the Commission's decision.

[23] El Paso Br. 17; California Br. 4.

[24] *See F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 17 (1961), in which the Supreme Court held that "The Commission cannot order a natural gas company to sell gas to users that it favors."

Nor can *Bass* be distinguished from the present case on the ground that Bass' interest in the gas was obtained under a farm-out agreement while the mineral estate of Mineral [401] Interest Owners will come into being upon the termination of Gulf's fixed term lease on July 14, 1975. We fail to see how this difference in the means by which the respective parties obtain their interest can be used to avoid application of the principles enunciated in *Bass* to the present case. Indeed, the mineral estate of Mineral Interest Owners, unlike the working interest obtained by Bass pursuant to its farm-out agreement option, will not be created out of the lease under which sales of gas to El Paso are being made. Since Mineral Interest Owners have no present or future interest in Gulf's fixed term lease, they are even further removed from the gas sales made by Gulf to El Paso than was Bass. Therefore, from the standpoint of dedication, Mineral Interest Owners occupy a stronger position than Bass did.

Staff also argues that its position in this case can be reconciled with *Bass* because Shell lacked authority to sell the gas reserves attributable to Bass' potential working interest[25] whereas in the present case Gulf had "the authority from the outset to sell all the gas from the subject reserves, and, therefore, all the gas was dedicated to El Paso." (Br. 10). To further support

[25] In this connection, Staff alleges (Br. 10) that ". . . it was likely not within the contemplation of Bass and Shell that Bass' proportionate working interest share of gas would be dedicated by Shell." (Br. 10). Staff's speculation is directly contrary to the order on rehearing in *Blair-Vreeland* where the Commission in elaborating on *Bass* agreed that Shell had attempted to dedicate Bass' gas to El Paso but could not do so because such gas was never owned by Shell (Opn. 724-A at p. 4).

this argument, Staff reiterates its claim that when Gulf's 50-year fixed term lease was executed it was "likely not within the contemplation of the parties to the lease(s) that any commercial amounts of gas remain after lease exploration" (Br. 10).

[402] We have already pointed out in some detail that contrary to Staff, Gulf has no authority to sell any gas which cannot be found and produced prior to July 14, 1975. Likewise, we have discussed the lack of factual support or logic for Staff's clairvoyant claim as to what was in the contemplation of parties 50 years ago.

Despite Staff's protestations and speculations to the contrary, there simply is no way to reconcile Staff's position in this case with the principles enunciated by the Commission in *Bass*. In both cases, El Paso has sought to alter the basic property rights of mineral owners by claiming they were required to obtain abandonment authorization under Section 7(b) before they could make sales of natural gas attributable to their mineral interest. Similarly, in both cases the thrust of the arguments presented has been that El Paso in some manner acquired a right to purchase gas attributable to the interests of such mineral owners which the lessee had no right to sell—and in this case had not attempted to sell. Therefore, the Commission's rationale in *Bass* is clearly applicable to this case and leaves no doubt that Mineral Interest Owners are not required to obtain abandonment authorization under Section 7(b) prior to commencing sales of gas attributable to the mineral estate they will hold when Gulf's lease terminates on July 14, 1975.

[403] CONCLUSION

For the foregoing reasons, and those set forth in their Initial Brief, Mineral Interest Owners respectfully submit that the arguments and positions submitted by El Paso *et al* are without merit and that upon consideration of the briefs filed herein, the Commission should find and declare that Mineral Interest Owners are not required to obtain any prior Commission authorization in order to commence sales of gas attributable to the mineral estate they will hold upon termination of Gulf's lease on July 14, 1975.

Respectfully submitted,

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June 24, 1975

[404] (CERTIFICATE OF SERVICE OMITTED IN PRINTING)

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[405] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

Reply Brief of Phillips Petroleum Company

Phillips Petroleum Company (Phillips) hereby files its Reply Brief in these proceedings pursuant to Section 1.29 of the Federal Power Commission (Commission) Rules of Practice and Procedure.

As set forth in the statements of the case contained in the initial briefs filed in this proceeding, Gulf Oil Corporation (Gulf) is currently making percentage sales of casinghead gas from its Ector County leasehold to Phillips. The residue gas remaining from the processing of such gas represents a portion of the volumes of residue gas sold at the tailgate of Phillips' Goldsmith Plant to El Paso Natural Gas Company (El Paso) under rate schedules of Phillips Petroleum Company on file with the Commission.

In its initial brief filed herein, El Paso asserts that Phillips may not reduce the volume of deliveries under the surplus residue gas contract without obtaining abandonment authorization from the Commission. By implication, if not expressly so, the Public Utilities Commission of the State of California (CPUC) makes the same assertion.

The arguments of El Paso and CPUC are inapposite to a plant operator such as Phillips purchasing gas under percentage of proceeds contract.

In all the cases cited by El Paso requiring continuation of service even by an "unwilling" seller, the seller has been "able" to continue service. This is not so in the case of Phillips in the instant situation. When the percentage of proceeds contract under which Phillips purchases gas terminates, Phillips will be as unable to [406] continue deliveries to El Paso of that gas as if the reservoir were depleted. That is the very nature of the plant operator's business and, we submit, is an explanation of why the Commission in Section 154.91(e) of its Regulations requires only that the plant operator-purchaser file an annual report of its percentage type purchasers. It is a clear recognition of the business of purchasing gas when and as available, processing it and reselling the residue. It involves gathering systems behind the plant which enable a plant operator to acquire small quantities, single leases, single wells, etc. with the knowledge that some will always be ending. To require a plant operator like Phillips selling under a *surplus* residue contract to obtain abandonment anytime any of those single sources ceases is not only impractical and illogical, it would be disruptive of the processing business which supplies the natural gas liquids needed as badly by the American consumer as natural gas is.

Phillips submits that under the Natural Gas Act and in particular Section 154.91(e) of the Regulations thereof, its only obligation as the operator of a processing plant purchasing gas from a producer at a price which is a percentage of the proceeds from the resale

of the residue gas is to include in its annual report required by such regulation a statement listing the ". . . changes in the producers from whom the gas is purchased or in the percentum they receive."

As to the question of the necessity of producers' obtaining abandonment authorizations under the particular facts of these cases, Phillips adopts and incorporates herein the arguments contained in the Initial Brief of Texaco Inc. filed herein.

Wherefore, Phillips submits that the question raised by El Paso as to whether Phillips can without prior [407] Commission authorization reduce its sales of surplus residue natural gas to El Paso to the extent of such residue as is attributable to the Gulf lease be answered in the negative.

Respectfully submitted,

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[408] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

IN THE MATTERS OF

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

(RECEIVED JUNE 27, 1975)

Reply Brief of Texaco Inc.

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[409] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

IN THE MATTERS OF

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

Reply Brief of Texaco Inc.

Texaco Inc. (Texaco) hereby files its reply brief in these proceedings pursuant to the Commission's "Notice of Revision of Briefing Schedule" issued June 13, 1975.

I.

INTRODUCTION

The initial briefs of Staff, El Paso Natural Gas Company (El Paso), People of the State of California, *et al.* (California), and Mitchell Energy Corporation (Mitchell) attempt to show that the reversionary owners in these proceedings will be required by the Natural Gas Act to obtain abandonment authorization from the Commission before making any disposition of their gas other than selling it to El Paso. These parties appear to be unaware of the reversionary interest owners' rights arising out of the Fifth Amendment and Tenth Amendment to the United States Constitution, which rights were discussed in Texaco's initial brief and will not be belabored herein. The object of

this brief is to point out only a few of the many fallacious arguments raised by the four above-named parties, for most of such arguments are without merit on their face.

II.

ARGUMENT

[410] Staff (Br. p.7) refers to cases holding that contract expiration and producer succession cannot "impede the continued interstate flow of gas once dedicated." Where one producer assigns his leasehold property rights to another producer, and gas attributable to that valid and existing leasehold property interest has been committed to interstate use, Texaco would agree that abandonment is required before another disposition of the gas can be made. However, the cases cited by Staff are clearly inapplicable to the present situation, for they do not involve termination of a lease, which extinguishes the underlying property right to the gas production. For example, Staff's reliance upon *Hunt* v. *F.P.C.*[1] is misplaced, for that case in no way involved the question of dedication *vel non*. It dealt only with the question of whether the Commission, "when granting an application for a temporary certificate authorizing the sale of natural gas in interstate commerce, can impose a condition that the applicant shall not increase its certificated price pending a hearing on the applicant's petition for permanent authority" (376 U.S. 515). The U.S. Court of Appeals for the Fifth Circuit had stated:

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[1] *Hunt* v. *F.P.C.*, 306 F.2d 334 (5th Cir. 1962), reversed, 376 U.S. 515 (1964).

"The consequences are too awesome for us to assume that Congress ever committed such undefinable legislative judgments to a legislative agency. There is, first, the status of the producer under a temporary. His rights may be temporary, but his duties are not, or at least on the present holding they are not. Like the ancient covenant running with the land, the duty to continue to deliver and sell flows with the gas from the moment of first delivery down to the exhaustion of the reserve, or until the Commission on appropriate terms, permits cessation of service under § 7(b), 15 U.S.C.A. § 717f(b)." (306 F.2d at 342)

[411] It can readily be seen that the language about "covenant running with the land" is pure dicta and has nothing to do with the present case when read in context. Furthermore, it should be noted that Staff has cited no U.S. Supreme Court case or any other case supporting the position it advocates. This position is contrary to the holdings in *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64 (1938) and *Sunderland* v. *United States,* 266 U.S. 266 (1924), as demonstrated in Texaco's initial brief in these proceedings. If Staff's arguments prevailed, the result would be federal common law applying to realty, which would bring about the chaos warned against at pages 5 and 6 of Texaco's initial brief. Texaco's position in the present case is that the owner of an estate for years (Gulf) cannot create a covenant running with the land which would extend beyond the estate itself. This is basic to all acceptable concepts of real property law.

Staff (Br. pp. 7-8) voices a fear that certain parties may try to circumvent the Natural Gas Act by enter-

ing into short-term leases and leases terminable at will, but such fear is imaginary. No prospective lessee in modern times will agree to such a lease under ordinary circumstances, for it would be a very imprudent business practice to give up one's lease on a property while it is still highly productive. Virtually all modern-day leases specify that they will continue in effect as long as production lasts. In fact, this very case, arising out of a fixed term lease executed by Gulf illustrates the hazards, from a lessee's point of view, in entering into the types of leases which Staff fears. The termination of a lease on property that is still highly productive is anything but beneficial financially to the lessee, as can be seen by looking at the effect of such termination upon Gulf in the instant situation. Further, the rarity of this type of occurrence is demonstrated by the fact that no direct case law exists on this point. It would be totally unrealistic to expect any increase in leases short in term, or terminable at will, to result from whatever holding is made in this case.

[412] The brief of Mitchell demonstrates an apparent failure to understand the issue in these proceedings, for it even fails to recognize that there is no precedent on the question presented. In contrast, the brief of Staff begins by stating, "This case involves a legal question of first impression before the Commission." Mitchell seems unaware of the difference between termination of a lease, and the coexisting evaporation of the underlying property rights to oil and gas production as contrasted with the mere assignment of an ongoing property interest, for it erroneously indicates that the Commission's Opinion No. 733 (Docket No. CI75-296) has

some bearing on the pertinent case. This premise is false, because the lessee in Docket No. CI75-296 (Mitchell) was an ordinary assignee of Gray Wolfe, Inc. As established by the Commission in *Cumberland Natural Gas Company,* 34 F.P.C. 132 (1965) such an assignee must continue selling production to the same interstate purchaser when the reserves have already been committed to interstate commerce.

Staff, Mitchell, El Paso and California are mistaken in arguing that the reversionary owners in this case will be in any way bound to sell their gas to El Paso upon expiration of the leases in Crane and Ector Counties. The reserves underlying those leases could not have been committed by Gulf Oil Corporation (Gulf) to a greater extend than Gulf's legal property interest in those reserves. Upon expiration of Gulf's leases, this property interest expires, and the reversionary interest owners cannot rightfully be bound in any way to sell to El Paso, for the Natural Gas Act does not attach to the land itself. Such a result would violate the above-mentioned holding in *Erie Railroad Company* v. *Tompkins* as well as the Fifth Amendment and Tenth Amendment to the United States Constitution.

For the reasons stated herein, together with those set forth in Texaco's initial brief, the Commission should hold that no party need obtain abandonment upon the expiration of Gulf's leases in Crane and Ector Counties, [413] Texas, regardless of what disposition the reversionary interest owners make of their gas.

Respectfully submitted,

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[414] (CERTIFICATE OF SERVICE OMITTED IN PRINTING)

[415] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

(RECEIVED JUNE 25, 1975)

Answer of Southwest Gas Corporation in Support of El Paso Natural Gas Company Brief

Southwest Gas Corporation ("Southwest"), pursuant to Section 1.12 of the Federal Power Commission's ("FPC") Rules of Practice and Procedure, respectfully files this Answer in support of the brief filed by El Paso Natural Gas Company ("El Paso") in the above-referenced docket.

In its brief, El Paso supports the following contentions:

1) Gulf, *et al.* may not terminate their sale of natural gas without obtaining abandonment authorization;

2) Warren and Phillips may not reduce their sales in interstate commerce without prior Commission abandonment authorization; and

3) Southland, *et al.* must obtain abandonment authorization in order to discontinue sales.

Southwest supports in full the arguments of El Paso on the above issues and urges that the public interest requires that abandonment authorization be obtained from the FPC before sales to El Paso may be terminated.

[416] WHEREFORE, Southwest Gas Corporation respectfully urges the Commission to give great weight

to El Paso Natural Gas Company's Brief and to grant El Paso's Petition for Declaratory Order.

Respectfully submitted,

SOUTHWEST GAS CORPORATION

/s/ By R. L. MUIRHEAD
R. L. Muirhead

Vice President/Regulatory Affairs

Dated: June 23, 1975

[417] (VERIFICATION OMITTED IN PRINTING)

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[418] (CERTIFICATE OF SERVICE OMITTED IN PRINTING)

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[419] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

(FILED JULY 2, 1975)

Motion of Exxon Corporation for Inclusion of Protective Order

Pursuant to Section 1.12 of the Commission's Rules of Practice and Procedure, Exxon Corporation hereby requests that the Commission include protective relief in any final order issued in these proceedings. In support whereof Exxon shows as follows:

I

These proceedings involve petitions of El Paso Natural Gas Company and Texaco Inc. wherein the central question is whether deliveries of natural gas by Gulf Oil Corporation, a lessee under a 50-year lease, dedicated all gas produced from the property, including gas which may be produced after expiration of the lease. Conversely, the question presented by El Paso is whether the mineral interest owners, Southland Royalty Company, *et al.*, and Exxon Corporation (herein referred to collectively as mineral interest owners) are required to obtain abandonment authorization at the expiration of the lease to Gulf if they sell production from their mineral interest to another market. Addi-

tionally, El Paso raises a question whether Gulf should be required to obtain abandonment authorization.

The lease to Gulf is due to expire on July 14, 1975.[1] Whether the Commission acts before July 14, 1975, or thereafter, the Commission action may impose obligations upon a party which will result in irreparable injury to that party if the Commission order should be reversed upon court review. This can be illustrated by considering the effect [420] of alternative Commission actions. For example,

(1) Assume that the Commission holds that no abandonment authority is required of the mineral interest owners. In such a case, the mineral interest owners would be free to sell their gas in intrastate commerce as of July 15, 1975. If El Paso, or an intervenor favoring El Paso's position, sould seek review and obtain reversal of the Commission's decision, such a party may desire protection pending judicial review, probably in the form of some pay-back provision. This could take the form of a protective order requiring the mineral interest owners to pay back the volumes sold to another market pending review, if it should be finally determined that El Paso were entitled to the gas.

(2) In the alternative, assume that abandonment authority is required of the mineral interest owners. In such a case, the mineral interest owners would

[1] The lease to Gulf from Texaco is due to expire in August, 1975. Because of the imminence of the July 14, 1975, expiration date of the lease from the mineral interest owners, the need for a protective order is urgent with regard to the petition of El Paso in Docket No. CP75-209.

not be free to sell their gas in intrastate commerce as of July 15, 1975, and would seek review. Pending review they would need affirmative assurance that if, upon review, the Commission's order should be overturned (a) any deliveries of gas made to El Paso after July 14, 1975, pursuant to the Commission's order would not constitute dedication of their gas to the interstate market; and (b) that El Paso would pay back the volumes delivered under circumstances that the pay-back volumes would not be considered jurisdictional gas and would not constitute the mineral interest owners, or any of their customers, subject to Commission jurisdiction by reason of the sale or transportation thereof.

The need for relief would be immediate, particularly in connection with the question whether deliveries by the mineral interest owners to El Paso would dedicate their gas to the interstate market. In the normal course, parties would be left to seek protective relief in the form of a stay, first to the Commission and then, possibly, to the courts. However, in this case since the gas is casinghead gas, production must continue. It would not be desirable to shut in production pending action upon a request for stay since such action would result in interruption of oil and gas production and possible permanent damage to the wells. If the Commission [421] should require that the gas be delivered to El Paso after July 14, 1975, the mineral interest owners would be entitled to a determination, prior to July 15, that involuntary deliveries to El Paso would not dedicate the gas to the interstate market, pending the ultimate outcome of judicial review. In view of

present time constraints, delay in action upon a request for stay until after issuance of the Commission order on the merits could not provide adequate protection to the mineral interest owners. Similarly, if the mineral interest owners are held to be free to sell their gas to any market, El Paso may desire immediate relief in the form of a pay-back requirement.

To avoid these problems and to avoid the numerous pleadings in various jurisdictions which would result from requests for protective relief, the parties hereto request that the Commission incorporate in its final order in this proceeding language which protects all parties pending ultimate judicial review. To this end the parties suggest the following language:

(A) If answers to the El Paso questions are determined in the negative, *i.e.* that no abandonment authorization is required of the mineral interest owners, the following language should be included in the Commission's order:

> "If Southland, Exxon, and the other mineral interest owners should determine not to make sales of their production to El Paso and should El Paso or any other party decide to seek court review of this order, and if the Commission's determination herein should be reversed upon review and the gas be held to have been dedicated to El Paso, then Southland, Exxon, and the other mineral interest owners shall be required to repay to El Paso volumes of gas, in an equitable manner over a reasonable period of time, equal to those which should have been delivered to El Paso

from the subject properties from July 15, 1975, until the date deliveries to El Paso are required to commence pursuant to final order no longer subject to review."

(B) If the answers to El Paso's questions are determined in the positive, *i.e.* that abandonment authorization is required of the mineral interest owners, then the following language should be included in any Commission order:

[422] "If Southland, Exxon, or other mineral interest owners should seek review of this order and upon review it should be ultimately determined that the gas may be sold to others than El Paso without abandonment authority, then any deliveries by Southland, Exxon, or the other mineral interest owners pending such judicial review shall not have constituted a dedication of their gas to the interstate market and acceptance of monies paid for gas delivered pending judicial review shall not prejudice the rights of the mineral interest owners to claims for any rate different from the rate tendered by El Paso or other rights in the premises; further, El Paso shall be required to repay Southland, Exxon, and the other mineral interest owners in gas for the deliveries made to it pending judicial review. Such repayment is to be made by El Paso subject to the following conditions: (a) the pay-back volumes are to be delivered in an equitable manner over a reasonable period of time (b) Southland, Exxon, and the other

mineral interest owners shall return to El Paso the monies paid for deliveries made pending judicial review, and (c) the pay-back volumes shall not be considered to be jurisdictional gas and acceptance thereof by Southland, Exxon, or the other mineral interest owners, or any of their customers, shall not subject any of them to Commission jurisdiction."

Submittal of this motion for a protective order is without prejudice to the rights of Exxon as to any substantive issues in the case. Exxon requests such additional relief as may be appropriate in the premises.

Respectfully submitted,

EXXON CORPORATION

By /s/ SHERMAN S. POLAND
Sherman S. Poland
ROSS, MARSH & FOSTER
730-15th Street, N.W.
Washington, D.C. 20005
Its Attorneys

July 2, 1975.

[423] (AFFIDAVIT OMITTED IN PRINTING)

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(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

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[424]

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July 3, 1975

Mr. Kenneth F. Plumb
Secretary
Federal Power Commission
825 N. Capitol Street, N. E.
Washington, D. C. 20426

(FILED JULY 3, 1975)

Re: *El Paso Natural Gas Company,*
Docket Nos. CP75-209, *et al.*

Dear Mr. Plumb:

On July 2, 1975, Exxon Corporation filed its motion for inclusion of protective order in the above-captioned proceeding. In that motion, Exxon suggested that to avoid the potential irreparable injury, confusion and requests for judicial intervention which could result from subsequent reversal on the merits of a Commission decision in this proceeding, the Commission should incorporate in its final order language which would protect the interests of all patries pending completion of judicial review on the merits of the controversy herein.

Under Exxon's proposal, specific provision would be made for payback of volumes over a reasonable

period of time in the event that during the appellate process gas was delivered to a party eventually determined to have no right to receive the gas. Delivery of such payback volumes would not be considered a jurisdictional transpotration or sale and would not subject the receiving party to Commission jurisdiction. Also, Exxon requested that the Commission provide that neither delivery of gas pending appeal nor receipt of monies paid therefor would constitute dedication of gas to interstate commerce. Exxon's request for such [425] protective order was made without prejudice to its rights as to any substantive issues in this proceeding.

Mineral Interest Owners concur in Exxon's suggestion that the Commission should include in any order issued herein language which will protect all parties in the event that the Commission's determination on the merits of the controversy is reversed on appeal. Mineral Interest Owners' support of Exxon's motion is, of course, offered without prejudice to its rights as to any substantive issues in this proceeding.

Nevertheless, Mineral Interest Owners wish to make it clear that their support of Exxon's motion is predicated on the Commission's issuing an order prior to July 14, 1975 and upon the Commission's acceptance of the substantive aspects of Exxon's proposal. Thus, Mineral Interest Owners' concurrence should not be construed as a waiver of their rights to seek such stays, injunctions or other relief from this Commission or an appropriate court, which they may deem necessary in the event that the Commission does not issue an order in this proceeding prior to the expiration of the 50-year fixed term lease on July 14, 1975 or in an order

issued prior to that date does not provide protective language protecting sufficiently the interests of Mineral Interest Owners.

Mineral Interest Owners' support of Exxon's motion is further predicated on their understanding that the payback provisions of the protective language would not be activated until the issuance by an appellate court of a final nonappealable order resolving the issue of whether the gas involved in the controversy herein is dedicated to interstate commerce. Consequently, the payback obligation would not be triggered by appellate reversal of the Commission's decision for reasons not involving the merits of the case.

[426] Copies of this letter are being served on all parties to this proceeding.

Respectfully submitted,

J. EVANS ATTWELL
One of Counsel for
Mineral Interest Owners

PWD/jed
cc: All parties

[427]

RECEIVED JULY 9, 1975

FEDPWRCOMM WSH
GOCGUL WPC TUL
7-7-75
HON KENNETH F PLUMB
SECRETARY
FEDERAL POWER COMMISSION
825 NORTH CAPITOL ST
WASH DC

GULF OIL CORPORATION SUPPORTS THE "MOTION OF EXXON CORPORATION FOR INCLUSION OF PROTECTIVE ORDER" IN ANY ORDER ISSUEDDIN EL PASO NATURAL GAS COMPANY, DOCKET NO. CP75-209. A COPY OF THIS TELEGRAM HAS BEEN MAILED ON THIS DATE TO ALL PARTIES ON THE SERVICE LIST.

WARREN M SPARKS
ATTORNEY FOR GULF OIL CORPORATION TULSA OK
CORR TEXT LINE 2 LAST TWO WORDS ISSUED IN
GOCGUL WPC TUL
FEDPWRCOMM WSH

[428] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

(FILED JULY 10, 1975)

Answer of El Paso Natural Gas Company To Motion of Exxon Corporation For Inclusion of Protective Order

Pursuant to Section 1.12 of the Commission's Rules of Practice and Procedure, EL PASO NATURAL GAS COMPANY ("El Paso") respectfully submits this answer to the pleading filed by Exxon Corporation ("Exxon") in the above-styled dockets on July 2, 1975 styled "Motion of Exxon Corporation for Inclusion of Protective Order". In support hereof, El Paso avers as follows:

I.

Docket No. CP75-209 involves a petition filed by El Paso for issuance of a declaratory order resolving the questions (1) whether Gulf Oil Corporation and other lessees who have been selling natural gas to El Paso produced from a certain 50-year fixed term lease which will terminate on July 14, 1975, involving property in Crane County, Texas must obtain abandonment authorization pursuant to Section 7(b) of the Natural Gas Act and Section 154.91 of the Commission's Regulations under said Act in order to cease

such sales to El Paso, (2) whether Exxon Corporation, Southland Royalty Company and other reversionary interests may, without prior Commission authorization, divert natural gas from its present movement in interstate commerce to delivery and sale in intrastate commerce and (3) whether, without prior Commission authorization, Warren Petroleum Corporation may reduce its sales in interstate commerce of residue natural gas to El Paso, the present level of which is attributable in part to production from the said 50-year fixed term lease.

Docket No. CI75-594 involves a petition filed by Texaco Inc. ("Texaco") seeking issuance of a declaratory order involving a lease similar in terms covering property located in Ector County, Texas which will terminate on August 7, 1975. The issue as described by Texaco is whether a lessee, by making an interstate gas sale, can commit more than its real property interest (*i.e.*, its rights under its lease), thereby both encumbering forever the real estate and imposing upon the nonparticipating mineral fee owner the obligations under Section 7 of the Natural Gas Act.

[429] II.

El Paso concurs with Exxon's conclusion as to the need for incorporation by the Commission in its final order in this proceeding of language which protects all parties pending ultimate judicial review of the questions here involved. However, since payback of gas either to or by El Paso will affect directly El Paso's level of service to the interstate market, El Paso believes the language set forth at pages 3 and 4 of Exxon's motion should be amended to read as follows

(additional language suggested by El Paso is underscored):

"(A) If answers to the El Paso questions are determined in the negative, *i.e.*, that no abandonment authorization is required of the mineral interest owners, the following language should be included in the Commission's order:

'If Southland, Exxon, and the other mineral interest owners should determine not to make sales of their production to El Paso and should El Paso or any other party decide to seek court review of this order, and if the Commission's determination herein should be reversed upon review and the gas be held to have been dedicated to El Paso, then Southland, Exxon, and the other mineral interest owners shall be required to repay to El Paso, *subject to further Commission order,* volumes of gas, in an equitable manner over a reasonable period of time, equal to those which should have been delivered to El Paso from the subject properties from July 15, 1975, until the date deliveries to El Paso are required to commence pursuant to final order no longer subject to review.'

"(B) If the answers to El Paso's questions are determined in the positive, *i.e.*, that abandonment authorization is required of the mineral interest owners, then the following language should be included in any Commission order:

'If Southland, Exxon, or other mineral interest owners should seek review of this order

and upon review it should be ultimately determined that the gas may be sold to others than El Paso without abandonment atuhority, then any deliveries by Southland, Exxon, or the other mineral [430] interest owners pending such judicial review shall not have constituted a dedication of their gas to the interstate market and acceptance of monies paid for gas delivered pending judicial review shall not prejudice the rights of the mineral interest owners to claims for any rate different from the rate tendered by El Paso or other rights in the premises; further, El Paso shall be required to repay Southland, Exxon, and the other mineral interest owners in gas for the deliveries made to it pending judicial review. Such repayment is to be made by El Paso subject to the following conditions: (a) the pay-back volumes are to be delivered, *subject to further Commission order,* in an equitable manner over a reasonable period of time, (b) Southland, Exxon, and the other mineral interest owners shall return to El Paso the monies paid for deliveries made pending judicial review, and (c) the pay-back volumes shall not be considered to be jurisdictional gas and acceptance thereof by Southland, Exxon, or the other mineral interest owners, or any of their customers, shall not subject any of them to Commission jurisdiction.'"

Respectfully submitted,

EL PASO NATURAL GAS COMPANY

By /s/ C. FRANK REIFSNYDER
C. Frank Reifsnyder
One of Counsel

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[431]
C. FRANK REIFSNYDER
HOGAN & HARTSON
815 Connecticut Avenue
Washington, D. C. 20006

Counsel for

EL PASO NATURAL GAS COMPANY

Dated: July 10, 1975

[432] (VERIFICATION OMITTED IN PRINTING)

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[433]

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

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[434] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. CP75-209, *et al.*

EL PASO NATURAL GAS COMPANY, *et al.*

FILED JULY 11, 1975

Response of Exxon Corporation To Answer of El Paso Natural Gas Company To Exxon's Motion for Inclusion of Protective Order

Exxon Corporation (Exxon) submits this response to the answer filed by El Paso Natural Gas Company (El Paso) the afternoon of July 10, 1975, to Exxon's motion for inclusion of a protective order in the above-captioned proceedings. Exxon recognizes that the Commission's rules do not expressly provide for the filing of responses to answers to motions. However, because of the substantial substantive change which El Paso has suggested to Exxon's originally proposed protective order, Exxon requests leave to file the instant response. In support whereof Exxon shows as follows:

I

In its motion filed July 2, 1975, Exxon requested that the Commission include certain alternative protective provisions in any final order which the Commission issued in these proceedings. Such protective provisions were designated to avoid prejudice to any party by complying with the holding of the Commission's order while perfecting its right of appeal of such order. Taking first the situation where the Commission's order would hold that Exxon is not required to deliver its gas to El Paso, the suggested protective

provision provided that Exxon would return to El Paso gas volumes equivalent to those delivered to Intratex during appeal should El Paso obtain a reversal of the Commission's order upon conclusion of judicial review. On the other hand, should the Commission's order hold that Exxon is required to deliver its gas to El Paso, the suggested protective provision provided that El Paso would return to Exxon gas volumes equivalent to those delivered to it by Exxon during appeal should Exxon obtain a reversal of the Commission's order upon conclusion of judicial review.

[435] By its July 10, 1975, answer to Exxon's motion, El Paso proposes to change the requirement that gas will be repaid if the Commission's order is reversed from a positive requirement to a contingent requirement. It accomplishes this by making the payback obligation "subject to further Commission order." Such proposed modification makes the protective provisions totally illusory. If there were no protective provision whatsoever and a party prevailed in obtaining a reversal of the Commission's order, that party could request the Commission to require a payback of the other party and such payback would be "subject to further Commission order." The significant fact is that, at that time, the party requesting payback would have already been injured by delivering or foregoing deliveries of gas and its remedy for such injury would be contingent rather than definite.

II

WHEREFORE, Exxon requests that the Commission deny the modification to the protective provisions proposed by El Paso.

Respectfully submitted,

EXXON CORPORATION

By /s/ BERNARD A. FOSTER, III
SHERMAN S. POLAND
BERNARD A. FOSTER, III

ROSS, MARSH & FOSTER
730 - 15th Street, N.W.
Washington, D.C. 20005

Its Attorneys

Dated at Washington, D. C.,
this 11th day of July, 1975.

[436] (AFFIDAVIT OMITTED IN PRINTING)

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(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

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[437] ROSS, MARSH & FOSTER

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION No. 737

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

(ISSUED: JULY 11, 1975)

Declaratory Opinion and Order on Termination of Long-Term Leases

[438] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; William L. Springer, and Don S. Smith.

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

OPINION NO. 737

(Issued July 11, 1975)

Declaratory Opinion and Order on Termination of Long-Term Leases

PER CURIAM.

El Paso Natural Gas Company on January 20, 1975, filed in Docket No. CP75-209 a petition for a declaratory order with respect to a 50-year fixed term lease currently held by Gulf Oil Corporation and others (Gulf, *et al.*) which will expire on July 14, 1975. By the terms of the lease Gulf obtained the exclusive right to produce and sell oil and gas from 45,771 acres of land in Crane County, Texas. When the lease expires, the mineral rights will revert to the mineral interest owners (Southland, *et al.*)[1]

[1] Originally the lease was executed with W. N. Waddell, *et al.* as lessors. Present owners include Southland Royalty Company 47.00%, Trustees under the will of Warren Wright 25.7%, Exxon Corporation 14%, and more than 100 others.

Gulf, *et al.* make percentage type sales to Warren Petroleum Company, now a division of Gulf covering certain quantities of casinghead gas produced from the Crane County acreage. Pursuant to two gas purchase contracts, dated January 26, 1951, and March 1, 1972, Warren sells to El Paso approximately 60,000 Mcf per day of surplus residue gas at the outlet of the Waddell Gasoline Plant, and El Paso transports [439] this gas through its jurisdictional facilities for subsequent resale in interstate commerce. Approximately 25,000 Mcf per day of this residue gas comes from wells leased by Gulf, *et al.*

Upon termination of the lease the owners of the mineral interests will hold a fee simple title as reversioners to their pro rata share of the mineral estate underlying the subject acreage. *Gulf Oil Corp.* v. *Southland Royalty Co.*, 496 SW2d 547, 522 Tex. Sup. Ct. 1973 (1973). The mineral interest owners state that they have agreed to sell to Intratex Gas Company the gas from their fee simple estate. Furthermore El Paso says that Exxon has solicited proposals for the purchase of the gas attributable to its reversionary interest rights for resale in intrastate commerce.

On this state of facts on which there is no dispute El Paso seeks an order determining whether Southland, *et al.* may sell the gas from the Crane County leasehold in intrastate commerce without prior permission and approval of the Commission under Section 7(b) of the Natural Gas Act, whether Gulf, *et al.* must obtain the permission and approval of the Commission to cease making sales to Warren and to transfer their rights to Southland, *et al.*, and whether

Warren (now Gulf) may reduce its sales to El Paso to the extent they are attributable to the leasehold property without prior Commission permission and approval.

In like manner on April 8, 1975, Texaco Inc. in Docket No. CI75-594 filed a petition for a declaratory order to determine whether a lessee, by making an interstate gas sale, can commit more than its real property interest (i.e. its rights under its lease) thereby both encumbering forever the real estate and imposing upon the nonparticipating mineral fee owner the obligations of Section 7 of the Natural Gas Act. The facts underlying Texaco's petition are similar to those involved in El Paso's petition. In 1925 Gulf, as lessee, [440] and Goldsmith, *et al.* as lessors, executed a 50-year fixed term oil and gas lease by which Gulf obtained exclusive mineral rights to some 19,840 acres in Ector County, Texas, until August 7, 1975, when the mineral rights would revert to Goldsmith, *et al.*, with whom Texaco acquired a ¼ interest in 1929. Gulf sells gas from the Ector County leasehold to Phillips Petroleum Company under a percentage-type casinghead gas sales contract, and Phillips sells the residue gas from the tailgate of its Goldsmith Plant to El Paso. Approximately 18,000 Mcf per day of the residue gas sold to El Paso by Phillips is attributable to the Ector County lease. Texaco says that it has knowledge of these sales contracts but is not a party to either one.

On June 3, 1975, after a petition by Texaco, the Commission consolidated Docket Nos. CP75-209 and CI75-594 because of the similarity of the facts and legal questions, found that because there was no fac-

tual dispute and no request for a hearing there was no need to hold an evidentiary hearing, and provided opportunity for filing briefs. Accordingly, initial briefs were filed on June 20, 1975, or thereabouts, by Mineral Interest Owners, El Paso, Texaco, Gulf, People of the State of California and the Public Utilities Commission of the State of California, Exxon, Mitchell Energy Corporation and the Staff. Reply briefs were filed on June 25, 1975, by Mineral Interest Owners, El Paso, Texaco, Exxon, Phillips and the Staff.

On July 2, 1975, Exxon filed a motion requesting the Commission to include protective relief in any final order in the form of payback of volumes of gas if the Commission's order is reversed on review. The Mineral Interest Owners responded on July 3, 1975, supporting Exxon's motion on the basis of their understanding of it. By telegram of July 7, 1975, Gulf also supported the motion, and El Paso concurred on July 10, 1975, with a request for an amendment of the protective language.

On the question whether Southland, *et al.* may sell the gas from the Crane County leasehold in intrastate commerce without Commission approval and whether Goldsmith and Texaco may do likewise with respect to the Ector County gas, Mineral Interest Owners, Exxon and Texaco, with the support of Gulf, argue variously that they are not required to obtain abandonment authority before initiating intrastate sales. They point out [441] that the Commission has no authority to compel a producer to sell his gas in interstate commerce, and that their royalty interest

does not make them sellers of gas in interstate commerce within the meaning of the Natural Gas Act and in no way dedicates their gas to the interstate market. They cite *Mobil Oil Corp.* v. *F.P.C.*, 463 F.2d 256 (CADC 1971), *certiorari denied*, 406 U.S. 976 (1972), where the Court held that royalty owners were ordinarily not sellers of the gas. They note that in the instant case Gulf possessed only a 50-year leasehold right and had no legal authority to sell the gas produced beyond the termination date of the lease.

They rely heavily on *El Paso Natural Gas Co.* v. *Perry R. Bass*, 48 FPC 1269, Opinion No. 638 (1972). There Shell held a farmout lease from Bass, who retained a royalty with the option after Shell recovered the cost of drilling to receive in lieu of the royalty a ½ working interest in the lease. Shell later sold gas from its "properties" to El Paso, and El Paso was to purchase from seller's "interest" in the wells. Still later Bass notified Shell of its election to accept a working interest and attempted to sell its working interest gas to Natural Gas Pipeline Company, but El Paso objected. The Commission held that the Shell-El Paso contract did not purport to cover any gas save that produced from the properties owned by Shell, that Bass was a royalty owner and not a seller, that Section 7(b) did not apply to Bass, that farmouts should be encourged and that Bass did not have to obtain abandonment authorization before making its sale to Natural.

Texaco also argues that there will be no transfer of rights for the Commission to consider when Gulf's leases expire, for the leasehold estates will vanish and the reversion will occur by operation of law.

Texaco also contends that the Commission lacks authority to adjudicate matters of title and must conform to state law, citing *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64 (1938). Both Texaco and Exxon also argue that they would be deprived of their properties without due process of law in violation of the Fifth Amendment if they were forced to sell their gas to El Paso after Gulf's leases terminate.

El Paso takes a contrary view. It says that once natural gas begins to flow in interstate commerce it becomes dedicated and Section 7(b) provides the exclusive means of terminating [442] the service. The lessees have dedicated the gas produced by their wells and regardless of the termination of the lease, service must continue. It contends, further, that the reversionary interest owners step into the shoes of their predecessors, Gulf, *et al.*, and take the properties subject to the interstate dedications. It emphasizes that abandonment should not be permitted without a proceeding to determine that there is no betrayal of justifiable public reliance on the gas involved.

California says that the emphasis should not be placed on the contractual arrangements but on the fact that the gas is currently dedicated to interstate commerce by physical movement in El Paso's pipeline. California also argues that the *Mobil* case should not apply and that in any case the reversionary owners are like the sellers of leases in the *Rayne Field* case, *U.G.I.* v. *Continental Oil Co.*, 381 U.S. 392 (1965).

It is the position of the Staff that the gas from the subject acreage, whether produced before or after

expiration of the leases, is dedicated to the interstate market and that by virtue of their control over the gas the reversioners are subject to the constraints of Section 7(b). Staff adds that once the reserves are dedicated to the interstate market they become a part of the Commission's regulatory scheme, safeguarded by Section 7(b) to insure continuity and stability of service.

In our opinion the various mineral interest reversioners may not sell gas from the two leaseholds in intrastate commerce without prior permission and approval of the Commission. Although we have discovered no case directly in point, we are of the opinion that the cases and the purpose of the Natural Gas Act inevitably lead to this view. In the first place, the dedication involved is not the dedication of an individual party or producer, but the dedication of gas. In *CATCO, Atlantic Refining Co.* v. *P.S.C. of New York*, 360 U.S. 378 (1959), the Court said that once gas is dedicated "there can be no withdrawal of that supply from continued interstate movement without Commission approval." Furthermore, contractual arrangements are not [443] controlling as to whether the gas may be withdrawn from dedication. In *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 170 (1960) the Court upheld the Commission in granting an unlimited term certificate. The Court noted that the "service in which the producer engages is distinct from the contract which regulates his relationship with the transmission company in performing the service". Here a service is being rendered by Gulf to El Paso utilizing the gas in the Crane County and Ector County leases.

Because of the termination of the 50-year leases the lease holders, Gulf *et al.*, lose their leases and their rights pass to Southland, *et al* in one case and to Goldsmith, *et al* and Texaco in the other case. Of course, we have determined that gas may not be withdrawn from interstate commerce by the assignment of leases from one lessee to another. *Cumberland Natural Gas Company*, 34 FPC 132 (1965); *Blair-Vreeland*, — *FPC* —, Opinion No. 724, Docket No. CI74-331, March 18, 1975. But we do not rest our conclusion on these cases, but on the principle established by Section 7(b) that "service" may not be abandoned without our permission and approval. Thus it makes no difference whether a lease is transferred or terminates, the obligation of service imposed upon the dedicated gas continues. As said in *Hunt* v. *F.P.C.*, 306 F.2d 334, 342 (CA5, 1962), rev'd on other grounds, 376 U.S. 515 (1964), the duty to continue to serve is like an ancient covenant running with the land. This does not mean that we are modifying the law of Texas as to the leasehold rights; we are however recognizing rights and duties that have been created by the Congress under the Natural Gas Act. Nor are we depriving the reversioners of their property without due process of law, for we are merely holding that their property is subject to a Section 7(b) proceeding and, in any case, they will be compensated for any continued interstate sales under the Natural Gas Act.

The *Mobile* case does not call for any different result. Under that case the mineral interest owners in each of the leaseholds are not natural gas companies. However, the gas has been dedicated to inter-

state commerce and was being sold in interstate commerce by Gulf, *et al.* It cannot be sold in intrastate commerce, and the sales in interstate commerce abandoned without our permission and approval under Section 7(b).

[444] The *Bass* case, which did not involve the diversion of gas from interstate commerce, likewise does not alter our result. There the lessee, Shell, by means of its contract with El Paso, plainly intended to provide a service based upon the dedication of its interest in the leasehold, not the interest of Bass, who had the right to receive a ½ working interest in lieu of his royalty. The interstate dedication thus covered only part of the leasehold, while here the leaseholds were wholly dedicated to interstate commerce. In any case, we believe that the broad language used in *Bass* should be confined to the facts of the case and not extended to the difficult situation here involved. We therefore conclude that Section 7(b) applies to the sale of the gas from the dedicated reserves in the two leaseholds involved here until they are exhausted.

Mitchell Energy argues that should the mineral interest owners be held to be subject to Section 7(b) it would be erroneous for the Commission to exercise any jurisdiction over any reserves not connected to facilities rendering jurisdictional service. Thus undiscovered and undeveloped reserves, it says, fall beyond the Commission's jurisdiction over abandonment. Mitchell Energy is arguing over again the issues which it raised in Opinion No. 733, *Mitchell Energy Corporation*, — FPC —, Docket No. CI74-296, issued June 11, 1975. We believe those issues are adequately covered in that opinion.

As to whether Gulf, *et al.* must obtain abandonment permission in order to cease sales to Warren and transfer their rights to Southland, *et al.*, El Paso argues that the lessees have dedicated the natural gas produced by their wells to interstate commerce and may not cease making sales of the gas from these wells without abandonment authorization. El Paso indicates, however, that because Gulf has merged with Warren, Gulf would not have to obtain abandonment of its sale to Warren, but would to Phillips. Gulf itself points out that by virtue of the merger of Warren into Gulf there are no sales of gas between Gulf and Warren. Exxon says that with the expiration of the 50-year lease, El Paso's right to purchase production from Gulf ceases and so it does not require abandonment authorization.

[445] Staff says that an abandonment application by lessees would be superfluous and inconsistent with the purpose of Section 2.64 of the Commission's General Policy and Interpretations to avoid unnecessary filings. However, as El Paso argues, Section 154.91(e) of the Commission's Regulations leaves subject to Section 7(b) producers making percentage-type sales to plant operators selling gas in interstate commerce. Therefore it would seem that Gulf would have to file for abandonment of its sales to Phillips, and the other lessees would have to file for abandonment of their sales to Phillips and Gulf's former affiliate Warren, now part of Gulf. In our opinion this is not a mere technical requirement as staff would have it but would allow as to pass upon the merits of the lessees' abandonments upon the termination of the 50-year leases as well as the proposed

abandonment of the reversioners, who want to remove the gas from interstate commerce. We should have all the significant parties before us if the relations between the reversioners, lessees, processing plants, and El Paso are to be changed.

As to whether Warren and Phillips may reduce their sales to El Paso without prior Commission permission and approval El Paso points out that the sales are in interstate commerce and abandonment authorization must be obtained if the quantities are to be permanently reduced even though the contracts provide for the sale of only surplus residual gas. Gulf points out that Warren now means Gulf and says that upon expiration of the fixed term leases the gas produced therefrom will no longer contribute to the surplus residue gas Gulf could sell to El Paso, that the gas will belong to the reversioners, and that Gulf will have no control over it. The Staff, Exxon and Phillips say that under Section 154.91(e) of the Regulations the only obligation on a plant operator is to file an annual report listing any changes in the producers from whom the gas is purchased.

In our opinion the Commission did not intend to exempt plant operators from the requirement that they apply under Section 7(b) for abandonment of their sale to the extent that the sale has been reduced by a substantial and permanent loss of supply. Therefore the two plant operators Gulf (Warren) and Phillips should make applications under Section 7(b) if they lose substantial amounts of the gas they sell to El Paso upon termination of the 50-year leases.

[446] In its motion of July 2, 1975, Exxon argues that whether the Commission acts before July 14,

1975, or thereafter, the Commission's action may impose obligations upon a party which will result in irreparable injury to that party if the Commission order should be reversed upon court review. It points out that it would not be desirable to shut in production pending action upon a request for stay since such action would result in interruption of oil and gas production and possible permanent damage to the wells. It requests that the Commission in its final order in this proceeding include language intended to protect all parties pending ultimate judicial review.

Briefly Exxon would require that if the Commission requires abandonment authorization for the mineral interest owners, as we have here, and it should be determined on review that the gas may be sold to others than El Paso without abandonment authority, then any deliveries by Southland, Exxon or other mineral interest owners shall not constitute a dedication of their gas to the interstate market, acceptance of monies shall no prejudice the rights of the mineral interest owners to claims for any rate different from the rate tendered by El Paso, and El Paso shall be required to repay Southland, Exxon and the other mineral interest owners in gas for the deliveries made to it during judicial review. Mineral Interest Owners state their support of Exxon's motion with certain reservations. El Paso concurs with Exxon's conclusion as to the need for protective language in the Commission's order. However, since payback of gas either to or by El Paso will affect directly El Paso's level of service to the interstate market, El Paso believes that Exxon's language should be amended by requiring payment subject to further Commission order.

In our opinion it is not appropriate for us under the Natural Gas Act to include the protective provisions requested by Exxon. We believe that if the parties need protective provisions in the form of a stay, payback of gas volumes or otherwise, they should address themselves to the appropriate court.

[447] *The Commission orders:*

(A) In accordance with the above discussion:

(1) Southland, *et al.*, Exxon, Goldsmith, *et al.*, Texaco and other mineral interest owners of gas reserves in the Crane County and Ector County leases involved here may not, upon termination of the leases, sell gas in intrastate commerce without prior permission and approval of the Commission under Section 7(b) of the Natural Gas Act;

(2) Gulf, itself, need not obtain abandonment permission and approval to cease sales to its division, Warren, but other lessees must do so, and Gulf must do so with respect to its sales to Phillips;

(3) Gulf, formerly Warren, and Phillips may not reduce their sales to El Paso to the extent such sales are attributable to production from the subject leasehold property without prior Commission permission and approval.

(B) Exxon's motion to include protective language in the Commission's order is denied.

By the Commission.

(S E A L)

MARY B. KIDD,
Acting Secretary.

[448] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

(Received August 6, 1975)

Application by Texaco Inc. for Rehearing

Texaco Inc. (Texaco) pursuant to Section 19(a) of the Natural Gas Act (15 U.S.C. 717) and Section 1.34 of the Commission's Rules of Practice and Procedure, respectfully applies for rehearing of the Commission's Opinion No. 737 ("Declaratory Opinion And Order On Termination Of Long-Term Leases") issued July 11, 1975 in the above named and numbered docket.

Opinion No. 737 is based upon the assumption that upon making an interstate sale, a lessee commits the total amount of the gas reserve, even though some of this gas will be produced after the lease expires. This decision would thereby allow a lessee to encumber property in which he has no rights under state law. As a result of such reasoning, the Commission has held that Texaco, as a reversionary owner (¼ interest) of a mineral fee will be compelled to sell gas in interstate commerce to El Paso Natural Gas Company (El Paso), upon termination of the lease currently held by Gulf Oil Corporation (Gulf) on

property located in Ector County, Texas. The Commission bases its holding upon Section 7(b) of the Natural Gas Act and declares that Texaco may not sell its gas in intrastate commerce without prior permission and approval of the Commission.

The Commission has acted outside the scope of its authority under the Natural Gas Act in rendering the decision herein. The Act gives the Commission jurisdiction over sales for resale in interstate commerce, but Texaco cannot be deemed to have made any disposition of its gas until its right to take gas in kind accrues on August 7, 1975, upon the termination of the lease. At that time Texaco should be free to exercise [449] its own choice regarding disposition of its share of the gas. This conclusion is squarely supported by prior decision of the Commission (*El Paso Natural Gas Co.* v. *Perry R. Bass,* 48 FPC 1269, Opinion No. 638 (1972)), and by statutory construction. Furthermore, as demonstrated in Texaco's initial brief and reply brief in this proceeding, the 5th and 10th Amendments to the United States Constitution do not allow the Commission to take the acion which it purports to take through Opinion No. 737.

The Commision in its decision asserts that Texaco and other reversionary interest owners will not be deprived of their property without due process of law since "they will be compensated for any continued interstate sales under the Natural Gas Act." One of the facts the Commision fails to mention is that gas is being sold for much higher prices in the intrastate market than in the price-regulated interstate market. Texaco will be deprived of its Fifth

Amendment rights if it is forced to sell to El Paso rather than being allowed to choose the disposition for its gas without "prior permission and approval of the Commission. . . ."

Under the laws of the State of Texas, a lessee has no rights concerning an oil and gas property after expiration of the lease. The Commission's decision herein would have the effect of creating a federal common law allowing a lessee to encumber property forever. This holding violates the rule established by the Supreme Court of the United States in *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64 (1938), which unequivocally held that there can be no federal common law. Opinion No. 737 also violates the Tenth Amendment to the United States Constitution, which underlies the holding in the *Erie* case, which amendment reserves to the states those powers not granted to the federal government by the Constitution. It has long been established that the states, rather than the federal government, have the power to adjudicate title to land and minerals. The "tenure, transfer, control and disposition of real property are matters which rest exclusively with the state where the property lies. . . ." (*Sunderland* v. *United States,* 266 U.S. 226 at 232-33 (1924)).

In conclusion, Texaco urges the Commission to reverse [450] the position taken in Opinion No. 737 and to hold that no abandonment authorization for any party will be necessary or appropriate in regard to gas production from the Ector County property upon termination of Gulf's lease on August 7, 1975, regardless of what disposition is made of the gas at that time.

Respectfully submitted,

TEXACO INC.
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By /s/ C. FIELDING EARLY, JR.
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Houston, Texas
August 1, 1975

[451] (AFFIDAVIT OMITTED IN PRINTING)

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(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

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[453] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket Nos. CP75-209 and CI75-594

IN THE MATTERS OF

EL PASO NATURAL GAS COMPANY

and

TEXACO, INC.

Application of Mineral Interest Owners for Rehearing

Come now Mineral Interest Owners[1] and pursuant to Section 1.34 of the Commission's Rules of Practice and Procedure and Section 19(a) of the Natural Gas Act, 15 U.S.C. Sec. 717r(a) file this application for rehearing of Opinion No. 737 issued July 11, 1975, in the captioned proceedings. In support of this application for rehearing Mineral Interest Owners state as follows:

SPECIFICATIONS OF ERROR

(1) The Commission erred in holding that Mineral Interest Owners must obtain abandonment authorization under Section 7(b) of the Natural Gas Act before making [454] sales in intrastate

[1] Mineral Interest Owners, on whose behalf this "Application" is filed, were listed on Exhibit A attached to Mineral Interest Owners' "Initial Brief" in this proceeding. In Opinion 737 the Commission referred to Mineral Interest Owners and the other holders of a reversionary mineral estate collectively as "Southland, *et al.*"

commerce of casinghead gas[2] attributable to Mineral Interest Owners' fee simple mineral estate in certain properties located in Crane County, Texas.
(2) The Commission erred in holding that Warren and Phillips must obtain prior Commission approval before reducing sales of gas to El Paso and that certain lessees must obtain prior Commission approval to cease sales to Warren.
(3) The Commission erred in refusing to include appropriate protective provisions in its order.

ARGUMENT

I. ***The Commission Erred In Holding That Mineral Interest Owners Must Obtain Abandonment Authorization Under Section 7(b) Of The Natural Gas Act Before Making Sales In Intrastate Commerce Of Casinghead Gas Attributable To Mineral Interest Owners' Fee Simple Mineral Estate In Certain Properties Located In Crane County, Texas.***

A. *Introduction*

Mineral Interest Owners are the owners of the reversionary mineral estate underlying approximately

[2] As Mineral Interest Owners pointed out in their initial brief, with respect to the properties that are the subject of Docket No. CP75-209 the only gas ever sold by Gulf to El Paso were volumes of casinghead gas. Gas well gas from the Crane County properties that are the subject of Docket No. CP75-209 has always been sold in intrastate commerce. No party to his proceeding has suggested that the Commission has any jurisdiction over the gas well gas that has always flowed in intrastate commerce and Mineral Interest Owners assume that the Commission's decision was intended to only apply to the casinghead gas.

43,000 acres [455] in Crane County, Texas.[3] Prior to July 14, 1975, this mineral estate was subject to a 50-year fixed-term oil and gas lease between the predecessor in interest of Mineral Interest Owners as lessor and Gulf Production Company, predecessor of Gulf Oil Corporation, as lessee.[4] At midnight on July 14, 1975, Gulf's fixed-term lease expired and Mineral Interest Owners currently hold fee simple title to their pro rata share of the mineral estate underlying the subject acreage.[5] Prior to the termination of the Crane County leases, Gulf had sold surplus residue casinghead gas at the tailgate of the plant attributable to its fixed-term leasehold interest to El Paso Natural Gas Company.

The Federal Power Commission in Opinion 737, dated July 11, 1975, held, in the words of the Commission, that Mineral Interest Owners as the owners of the

> "reserves in the Crane County . . . leases involved here may not, upon termination of the leases, sell gas in intrastate commerce without prior permission and approval of the Commission under Section 7(b) of the Natural Gas Act."[6]

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[3] Southland Royalty Company is also the owner of a fractional reversionary mineral estate interest in the properties covered by the captioned Docket CI75-594. This application for rehearing also applies to this fractional reversionary mineral estate of Southland.

[4] The nature of Mineral Interest Owners' estate is more fully described in its initial brief at pages 4-8.

[5] *Gulf Oil Corp.* v. *Southland Royalty Co.*, 496 S.W.2d 547 (Tex. Sup. Ct. 1973).

[6] Op. 737 at 10. As will be more fully discussed below, Mineral Interest Owners take exception to certain of the factual characterizations contained in the Commission's holding in this case.

The Commission further held that although Gulf need not obtain abandonment in order to discontinue sales to Warren, [456] certain other lessees must do so.[7] In addition, the Commission ordered that Warren may not reduce its sales to El Paso "to the extent such sales are attributable to production from the leasehold property without prior Commission permission and approval."[8] Finally, the Commission refused to include in its order protective language that had been requested by the parties.

As the Commission correctly stated in Opinion 737, the facts in this case are undisputed.[9] However, in Opinion 737 the Commission incorrectly stated that Mineral Interest Owners would, after midnight on July 14, 1975, be producing and making sales of gas attributable to the "leasehold" estate previously held by Gulf. For example, the Commission states at one point,

> "In our opinion the various mineral interest reversioners may not sell gas *from the two lease-*

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[7] The Commission stated in its order that:

> Gulf, itself, need not obtain abandonment permission and approval to cease sales to its division, Warren, but other lessees must do so, and Gulf must do so with respect to its sales to Phillips . . .

Op. 737 at 10.

[8] Op. 737 at 10.

[9] To the extent the Commission's decision is in any way based upon facts which have not been agreed to by the parties, Mineral Interest Owners contend that the Commission's decision is in error as not being supported by substantial evidence.

holds in intrastate commerce without prior permission and approval of the Commission."[10]

[457] The fact is that none of the gas which Mineral Interest Owners will produce from their fee simple interest is from or attributable to the leasehold interest of Gulf or any other leasehold. All of the gas attributable to Gulf's leasehold has been produced—there is no more. Furthermore, the Gulf leaseholds have terminated and no longer exist. Gas can no more be produced from that leasehold than it could be produced from any other nonexistent property.

The Commission's repeated references to Mineral Interest Owners' producing gas from its "leasehold" reflects a fundamental misconception that pervades the Commission's entire decision in this case.[11] The Commission assumes in its decision that Gulf's dedication of gas attributable to its completely separate property interest can somehow bind and dedicate to interstate commerce gas attributable to the separate property interest of Mineral Interest Owners. This assumption is completely invalid and without merit. There has been no dedication to interstate commerce of gas attributable to Mineral Interest Owners' fee interest and, therefore, no abandonment authorization

[10] Op. 737 at 5. The Commission makes repeated references throughout its opinion to Mineral Interest Owners making sales of gas from the Crane County "leaseholds".

[11] There is no question that the Gulf leaseholds have terminated and that Mineral Interest Owners hold fee simple interest to their pro rata share of the mineral estate underlying the subject acreage. *Gulf Oil Corp.* v. *Southland Royalty Co.*, 496 S.W.2d 547, 522 (Tex. Sup. Ct. 1973).

is necessary in order for Mineral Interest Owners to sell the gas attributable to their reversionary mineral estate to an intrastate purchaser of their choice."[12]

[458]

B. *The Commission Erred In Holding That Any Gas Attributable To The Reversionary Fee Simple Mineral Estate Is Dedicated to Interstate Commerce.*

The Natural Gas Act comprehends that before jurisdiction can attach there must be a voluntary dedication of service to the intrastate market."[13] Mineral Interest Owners' basic position in this case is that there has been no such dedication of gas attributable to their reversionary fee simple mineral estate."[14] The Commission's decision to the contrary in this case is reached only by making erroneous factual and legal assumptions, misconstruing a number of appellate and Supreme Court decisions and by ignoring the Commission's own precedent. Thus, the Commission erroneously states at the outset of its discussion that "[a]lthough we have discovered no case directly in point,

[12] Mineral Interest Owners have elected to sell their gas to Intratex Gas Company, an intrastate buyer of gas, which is a wholly-owner subsidiary of Houston Natural Gas Corporation, a distributor of gas in the City of Houston, Texas, and environs.

[13] *See Argo Oil Corporation*, 15 F.P.C. 601, 618 (1955); *Pioneer Gathering System*, 23 F.P.C. 260, 263 (1960); *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 387-88 (1959).

[14] In the interests of brevity Mineral Interest Owners hereby incorporate by reference in support of this application for rehearing all arguments made by Mineral Interest Owners in their Initial and Reply Briefs, which are on file with the Commission. *See* "Initial Brief of Mineral Interest Owners" at 8-20; "Reply Brief of Mineral Interest Owners" at 7-18.

we are of the opinion that the cases and the purpose of the Natural Gas Act inevitably lead to [the] view"[15] that Mineral Interest Owners must obtain abandonment authorization under Section 7(b) before making sales of gas in intrastate commerce. As will be discussed in detail below, neither the purpose of the Natural Gas Act nor any of the cases cited by the Commission support its decision in Opinion 737. To the contrary, the Act and the relevant cases compel the conclusion [459] that the Commission erred in holding that there has been a dedication of gas attributable to the reversionary fee simple interest of Mineral Interest Owners.[16]

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[15] The Commission's explanation of its reasoning begins with the last paragraph on page 5 of Opinion 737.

[16] The Commission characterized one of the arguments made by El Paso in its brief in the following manner:

> [El Paso] emphasizes that abandonment should not be permitted without a proceeding to determine that there is no betrayal of justifiable public reliance on the gas involved.

Opinion 737 at 5. The Commission does not specifically find in its decision that there has been any "public reliance" upon the Crane County gas allegedly dedicated to interstate commerce. Indeed, the parties to this proceeding, including the Commission staff, are in agreement that term oil and gas leases are extremely rare. See footnote 10 in the "Initial Brief of Mineral Interest Owners". There is absolutely no evidence in this case to support any conclusion that the public may have "relied" upon the Crane County gas or that the public interest requires that such gas continue to flow in interstate commerce. To the extent that the Commission's decision may in any way be based upon the conclusion that there has been any "public reliance" upon the continued flow of gas attributable to Mineral Interest Owners' fee simple estate in interstate commerce or that the public interest otherwise requires that such gas continue to flow in interstate commerce, it is in error as not being supported by substantial evidence.

The Commission begins the rationale for its decision by citing the *CATCO* case for the completely noncontroversial principle that once gas is dedicated to the interstate market it cannot be withdrawn without Commission approval.[17] There can be no question that once a particular supply of gas is dedicated to the interstate market that deliveries of [460] that supply of gas cannot be discontinued without prior Commission approval. But the decisive issue in this case is whether gas attributable to the reversionary fee simple mineral estate of Mineral Interest Owners has ever been dedicated to interstate commerce. There has not been any such dedication here.

The Commission continues its analysis, citing *Sunray Mid-Continent Oil Company* v. *FPC*, 364 U.S. 170 (1960), and stating that "contractual arrangements are not controlling as to whether the gas may be withdrawn from dedication."[18] Again, we agree. But there is no contention here that any "contractual arrangement" is being used to withdraw gas dedicated to interstate commerce. To the contrary, no such "contractual arrangement" to withdraw gas from interstate commerce exists because there has never been any dedication of gas attributable to Mineral Interest Owners' reversionary fee simple mineral estate to interstate commerce. In sum, neither *CATCO* nor *Sunray* support the Commission's decision since in both cases there was no question that the gas there had been dedicated and the only issue was whether once

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[17] *See* Op. 737 at 5, wherein the Commission cites *CATCO*; *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (1959).

[18] *See* Op. 737 at 6.

dedicated it could be withdrawn. Here, there has never been any dedication of gas attributable to the reversionary fee simple mineral estate of Mineral Interest Owners.

Throughout Opinion 737 the Commission makes the erroneous assumption that the gas attributable to Mineral Interest Owner's fee simple mineral estate has somehow been dedicated to interstate commerce. In the words of the Commission:

> [T]he gas has been dedicated to interstate commerce and has been sold in interstate commerce by Gulf, *et al.* It cannot be sold in intrastate commerce, and the sales in interstate commerce abandoned without our permission and approval under Section 7(b).[19]

[461] In the final analysis, the Commission's assumption that the gas attributable to Mineral Interest Owner's fee simple estate is dedicated to interstate commerce must be based on the conclusion that somehow the delivery of gas attributable to Gulf's leasehold estate also committed the gas attributable to the Mineral Interest Owners' fee simple mineral estate to interstate commerce.

The fact is, however, no gas attributable to the reversionary fee simple mineral estate of Mineral Interest Owners' has ever been dedicated to interstate commerce. The only gas which was or could have been dedicated by Gulf was that attributable to Gulf's leasehold estate. In the simplest possible terms, all of

[19] Op. 737 at 6.

the gas attributable to Gulf's leasehold has been produced—there is no more.

The conclusion that Gulf's commitment of gas attributable to its fixed-term leasehold estate could not dedicate gas attributable to Mineral Interest Owners' estate is a matter of basic property law. It is well established that a reversionary interest, such as Mineral Interest Owners held during the term of Gulf's leasehold, is a separate property interest completely separate from Gulf's leasehold estate which exists simultaneously with the leasehold estate.

Mineral Interest Owners' property interest was, during the entire term of Gulf's 50-year lease, fully alienable and could be sold or otherwise transferred by Mineral Interest Owners completely separate and apart from Gulf's leasehold.[20] By like token, Gulf never had any interest in or power over Mineral Interest Owners' fee simple estate.[21] Just as the [462] owner of a life estate cannot bind the remainder, it is a fundamental principle of the law that a lessee for a term of years cannot bind the property interest of the reversioner. In the words of one recognized authority:

> The owner of a term for years cannot create an interest in land to endure beyond the term. It would follow that the owner of minerals could

[20] *See e.g., Union Electric Co.* v. *Slay Bulk Terminal, Inc.*, 475 S.W.2d 136 (Mo.Ct.App.—St. Louis 1971); *Haile* v. *Holtzclaw*, 414 S.W.2d 916 (Tex. 1967); *Katz* v. *Bakke*, 265 S.W.2d 686 (Tex. Civ.App.—San Antonio 1954, err. rev.).

[21] *Id.*

not create an interest to endure beyond his fixed term."[22]

It was solely the gas attributable to Gulf's fixed-term leasehold interests which was dedicated to interstate commerce.[23] Gulf, as the owner of a completely separate property interest, could not have dedicated Southland's gas to interstate commerce even if it had wished to do so.[24] Clearly, the Commission erred in holding that sales of gas attributable to Gulf's fixed-term lease dedicated to interstate commerce the gas attributable to the reversionary fee simple mineral estate of Mineral Interest Owners.

Mineral Interest Owners are well aware that the Commission apparently does not regard itself as being bound by [463] basic principles of property law. The facts in this case, however, do not present a situation in which fundamental property law[25] and Commis-

[22] *Williams & Meyers*, OIL AND GAS LAW § 332 at 117.

[23] Gulf has explicitly and unconditionally stated that it never intended to dedicate to interstate commerce any of the gas attributable to Mineral Interest Owners' reversionary fee simple estate. *See* "Initial Brief of Gulf Oil Corp." at p. 4.

[24] There is no evidence or suggestion by any party to this case that Gulf intended or attempted to dedicate the gas of Southland to interstate commerce. To the extent the Commission's decision is in any way based on the conclusion that Gulf intended or attempted to dedicate gas attributable to Mineral Interest Owners' revisionary interest, its decision is in error as not being supported by substantial evidence in addition to being erroneous for the reasons discussed above. See footnote 23, and accompanying text.

[25] Although the Commission may not be bound by principles of property law in situations in which its jurisdiction under the Natural Gas Act compel a different result, Mineral Interest Owners firmly believe that in this case the jurisdiction granted under the

sion jurisdiction clash. Indeed, the prior decisions of this Commission and reviewing courts [464] affirmatively establish that the Commission has no jurisdiction over gas attributable to Mineral Interest Owners' fee simple estate.

The Commission stated in Opinion 737 that the "purpose of the Natural Gas Act" led to its decision in that case.[26] There is no justification for any contention by the Commission that its decision in Opinion 737 is consistent with or required by the Natural Gas Act. The Natural Gas Act does not permit the Com-

Natural Gas Act does not compel or permit the result reached by the Commission in Opinion 737. Furthermore, Mineral Interest Owners question the wisdom of the Commission in straining to reach the result contained in Opinion 737 when the result does such great violence to uniformly accepted and well-established principles of property law. For the Federal Power Commission to so completely ignore the basic principle of comity. *See Wright*, FEDERAL COURTS, § 52 at p. 196 (2nd Ed. 1970). In other contexts the Federal Courts have given due deference to basic property principles in interpreting the manner in which to apply Federal Law. For example, under the Internal Revenue Code, reversion upon the termination of a fixed-term lease is not a taxable event for the reversionary interest owner. *See Hewitt Realty Co.* v. *Commissioner*, 76 F.2d 880, 884 (2nd Cir. 1935); *Miller* v. *Gearin*, 285 F.2d 225, (9th Cir.) *cert. den'd.* 250 U.S. 667 (1919). In this connection, we would note that in the *Bass* case, this Commission specifically recognized the importance of observing and adhering to basic property concepts when it stated as follows:

> The thrust of El Paso's argument is that El Paso in some manner acquired a right to purchase that which Shell had no right to sell. We will not so alter the basic property rights of mineral owners through the fiction of Section 7(b) application.

48 F.P.C. at 1276. Mineral Interest Owners contend that the Commission erred in altering the basic property rights of Mineral Interest Owners through the fiction of Section 7(b) application.

[26] Op. 737 at 5.

mission to extend its jurisdiction over gas which has never been dedicated to interstate commerce. Indeed, the jurisdiction of the Commission is limited by the Natural Gas Act to gas which has been dedicated to interstate commerce. Since there has been no dedication of Mineral Interest Owners' gas to interstate commerce, the "purpose" of the Natural Gas Act actually support Mineral Interest Owners' contention that the Commission has no jurisdiction over gas attributable to Mineral Interest Owners' reversionary fee simple mineral estate.

It is clear that the desire to keep gas in the interstate market is not a "purpose" under the Natural Gas Act which can be used to create Commission jurisdiction. In *Mobil Oil Corporation* v. *F.P.C.*,[27] Judge Leventhal, speaking for the D.C. Circuit, rejected such an attempt to expand Commission authority, stating:

> We do not think a different result warranted or mandated on the ground that the purpose of the Act is to protect the ultimate beneficiaries against exploitation by natural gas companies. That was indeed the objective of Congress, see FPC v. Hope Natural Gas Co., 320 U.S. 591, 610, 64 S.Ct. 281, 88 L.Ed. 333 (1944). The FPC is to be commended for attempting to further that objective, but it is not sufficient justification upon which to base an expansion of the Act to activities [465] clearly not within its terms. Congress did not give the FPC carte blanche to take whatever action it might consider appropriate in furtherance of this purpose. The FPC is limited by the provision establishing its jurisdiction, and we do not find in that provision, rooted as it is in a sale in interstate commerce, any basis for reaching out to cover the landowner's lease or its royalty payments.

[27] 463 F.2d 256 (D.C.Cir. 1971), *cert. den'd*, 406 U.S. 976 (1972).

In light of the above, the Commission clearly erred in stating that the "purpose" of the Natural Gas Act required or supported its decision in Opinion 737 that the gas attributable to Mineral Interest Owners' reversionary fee simple mineral estate is dedicated to interstate commerce.

The Supreme Court decisions in *CATCO* and *Sunray,* far from supporting the Commission's decision, stand four-square against the principle that the Commission seeks to apply in this case. In dramatic contrast to the Commission's decision here, the Supreme Court in both cases recognized that the extent and terms of a dedication of gas to the interstate market is controlled by the owner of the gas.[28] Mineral Interest Owners are unquestionably the owners of the gas attributable to their reversionary fee simple mineral estate.[29] They have never offered any of the gas attributable to their fee simple estate for sale in inter-

[28] *See CATCO; Atlantic Refining Co. v. Public Service Commission,* 360 U.S. 378, 387-88 (1959); *Sunray Mid-Continent Oil Co. v. F.P.C.*, 364 U.S. 137, 141 (1960). In both cases the Commission squarely stated that a producer had the right to reject a certificate and that the Commission could not unilaterally and without the consent of the owner of the gas impose its jurisdiction over a specific reserve.

[29] *See Gulf Oil Corp. v. Southland Royalty Co.*, 496 S.W.2d 547 (Tex. Sup. Ct. 1973).

state commerce and have never sold any of such gas in interstate commerce. Gulf, or for that matter, any other third party, [466] could not[30] and did not commit the gas attributable to Mineral Interest Owners' fee simple mineral estate to interstate commerce. Therefore, it is clear that under *CATCO* and *Sunray,* the gas attributable to the reversionary fee simple mineral estate of Mineral Interest Owners has not been dedicated to interstate commerce by the sales of gas attributable to the fixed-term lease of Gulf.

Mineral Interest Owners' contention that the gas attributable to their fee simple interest has never been dedicated to interstate commerce is further supported by the D.C. Circuit's decision in *Mobil Oil Corporation* v. *F.P.C.*[31] In that case, the Court of Appeals held that, under "an ordinary lease by the landowner to the producer, there is neither a 'customary' sale in interstate commerce nor its equivalent in economic effect."[32] The D.C. Circuit's decision in *Mobil* is, however, illustrative of a broader principle that is relevant here. *Mobil* graphically demonstrates that the Commission's jurisdiction is confined to the specific property interest that is dedicated to interstate commerce. The Commission's attempts to distinguish *Mobil* on the grounds that there has been a dedication of Mineral Interest Owners' gas is clearly

[30] See footnote 23, *supra.*

[31] 463 F.2d 256 (D.C.Cir. 1971), *cert. den'd,* 406 U.S. 976 (1972).

[32] This decision is dispositive of any suggestion that the gas attributable to Mineral Interest Owners' fee simple estate was dedicated to interstate commerce as a consequence of Mineral Interest Owners' status as the holder of a royalty interest. *See also J. M. Huber v. Denman,* 367 F.2d 104 (5th Cir. 1966).

in error." As [467] has been discussed above, Gulf, or any other third party, could not have dedicated the gas attributable to the Mineral Interest Owners' fee simple mineral estate to interstate commerce. Thus, the holding in *Mobil* is clearly applicable in this case.

In no context, other than Opinion 737, has the Commission even suggested that dedication to interstate commerce of gas attributable to one property interest somehow dedicates to interstate commerce the gas attributable to the interest of another property owner. It is, for example, well established that a lessee whose lease only covers production from formations down to a specific depth can only dedicate to interstate commerce those volumes of gas which he has a right to produce and develop. The lessee does not, merely by making sales from his leased portion, commit all of the gas (*i.e. gas* which may be produced from formations below the leased depth) that may be attributable to the entire mineral estate regardless of depth. As the Commission must be aware, there are innumerable sales of gas in interstate commerce in which the obligation to make deliveries is limited to a specific zone or a specific depth and there has never been any suggestion that the commencement of deliveries of gas in

[33] The Commission stated in its opinion:

> The *Mobile* [*sic*] case does not call for any different result. Under that case the mineral interest owners in each of the leaseholds are not natural gas companies. However, the gas has been dedicated to interstate commerce and has been sold in interstate commerce by Gulf, *et al.* It cannot be sold in intrastate commerce, and the sales in interstate commerce abandoned without our permission and approval under Section 7(b).

Op. 737 at 6.

interstate commerce from such a zone or depth would subject gas from another zone or from other depths to F.P.C. jurisdiction.

The principle that the extent of the dedication, and therefore the extent of the Commission's jurisdiction, is limited to the specific gas dedicated is equally true when different parties own undivided interests in a single property. For example, if two producers own a 50% undivided interest in a single lease, the fact that one such lessee [468] chooses to sell his 50% of the gas in interstate commerce does not bind the owner of the other undivided 50% to sell his gas in interstate commerce. Thus, it is common industry practice for a portion of the production from a single well to flow into interstate commerce while another portion produced simultaneously goes intrastate. This common and uniformly accepted practice of "split-streaming" illustrates conclusively that the mere fact that gas is produced from a particular well, reservoir or field does not mean that all of the gas that may ultimately be produced from that well, reservoir or field is dedicated to interstate commerce. This conclusion is not in any respect altered by the fact that deliveries of gas by Gulf to El Paso occurred at the tailgate of a gas processing plant rather than at the wellhead. There are numerous situations in which gas has been "split-streamed" at the tailgate of a gasoline plant so that a portion flows into interstate commerce and a portion into intrastate commerce. The Commission, of course, has no jurisdiction under the Natural Gas Act over the production and gathering of gas and so jurisdiction would not attach as a con-

sequence of the gathering of the gas to gas "split-streamed" at the tailgate of a plant.[34]

Mineral Interest Owners contend the attempts of the Commission to distinguish *El Paso Natural Gas Co.* v. *Perry R. Bass,* 48 F.P.C. 1269 (1972), are clearly erroneous. No matter what the Commission says, the principles enunciated in *Bass* correctly reflect the law and are applicable to this case.[35] In Opinion 737 the Commission attempts to distinguish [469] *Bass* on the grounds that there the producer "plainly intended to provide a service based upon the dedication of its interests in the leasehold, not the interest of Bass,

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[34] In re *Grunel Gas Corp.*, 47 F.P.C. 1440 (1972); In re *Transcontinental Gas Pipe Line Corp.*, 50 F.P.C. 1811 (1973).

[35] The Commission recently reaffirmed the principles established in *Bass* in its decision on rehearing in In re *Blair-Vreeland*, —— F.P.C. ——, Opinion No. 724-A, Docket CI74-331 (May 14, 1975). In that case, the Commission stated:

> We will also elaborate on our comments on the *Bass* case. In doing so, we agree with the following statement of that case offered by *Blair-Vreeland*:
>
> > . . . In *Bass*, the question was not what Bass could bestow on Shell, but what Bass, in fact, did bestow [on Shell] by way of a farm-out agreement. Bass retained a ⅛ override convertible into a ½ working interest after payout of the cost of drilling the well to Shell. Shell attempted to dedicate 100% of the gas [to El Paso] and the Commission held that the gas to which Bass was entitled (½) was not dedicated because it was never owned by Shell (application, pp. 10-11).
>
> The question before the Commission was whether Shell's dedication to El Paso included the portion of the acreage covered by the working interest held by Bass. The Commission held that it did not, and in so holding, stated conclusions entirely consistent with those we have reached in the instant case.

Op. 724-A at 4.

who had the right to receive a ½ working interest in lieu of his royalty."[36] Despite the Commission's assertion to the [470] contrary, precisely the same situation exists here as existed in *Bass*. In this case, Gulf clearly intended to render a service limited to its fixed-term leasehold interest." Gulf could not, even if it had wishes to, attempt to provide a service based upon any other interest. Even if Gulf had wished to render a "service" greater than that which it could legally perform, that attempt could not in any way bind the gas attributable to Mineral Interest Owners' fee simple estate."[37]

In Opinion 737 the Commission continues its attempt to distinguish *Bass* by asserting that

> [t]he interstate dedication [in *Bass*] thus covered only part of the leasehold, while here the

[36] Op. 737 at 7. The Commission in Opinion 737 in referring to the *Bass* case stated that *Bass* "did not involve the diversion of gas from the interstate market. . . ." Although the Commission did not suggest that this fact was the basis for its decision, Mineral Interest Owners except to any suggestion that *Bass* is distinguishable because the gas attributable to Mineral Interest Owners' fee simple mineral estate will go to intrastate commerce. In the first place, in *Bass* the gas was first sold under a sixty-day emergency sale and then pursuant to a limited term certificate. At the time of the *Bass* decision, therefore, there was no certainty that the Bass gas would continue to flow in interstate commerce. More importantly, the decision in *Bass* did not in any way rely upon the fact that the gas there would or might flow in interstate commerce, but upon the fact that the Bass gas was *never* dedicated to interstate commerce. To the extent that the Commission's attempts to distinguish *Bass* were in any way based on the assumption that the gas there would flow in interstate commerce, it was in error.

[37] See footnote 23, *supra*.

[38] See footnote 20-22, *supra*, and accompanying text.

> leaseholds were wholly dedicated to interstate commerce."[39]

In addition to being in direct conflict with Opinion 724-A, this statement misses the entire point. There is no question that, as the Commission states, the "*leaseholds* [of Gulf] were wholly dedicated to interstate commerce." The fact that Gulf may have dedicated the gas attributable to its leasehold estate, however, is completely irrelevant to [471] and has no effect upon the gas attributable to Mineral Interest Owners' reversionary fee simple mineral estate. As has been previously stated, the only gas which has even been (or could be) dedicated to interstate commerce by Gulf is that attributable to Gulf's fixed-term leasehold. All of that gas has been produced and Gulf's fixed-term leasehold has terminated. Indeed, Mineral Interest Owners contend that here it is even clearer than in *Bass* that the Commission has no jurisdiction since *Bass* involved two interests in the same lease, while here there are two completely separate property interests. Mineral Interest Owners contend that the principles enunciated in *Bass* are clearly applicable to and dispositive of this case.

For the reasons discussed above, Mineral Interest Owners contend that the gas attributable to their fee simple estate has never been dedicated to interstate commerce. The Commission, therefore, erred in holding that Mineral Interest Owners are obligated to obtain abandonment authorization pursuant to Section 7(b) of the Natural Gas Act before making sales of gas in intrastate commerce.

[39] Op. 737 at 7.

C. *The Commission Erred in Suggesting That Mineral Interest Owners Are Successors of Gulf.*

In Opinion 737, the Commission suggests that Mineral Interest Owners are, in some manner, a successor in interest to Gulf.[40] Although the Commission disclaims that this is [472] the basis for its decision, Mineral Interest Owners take issue with any implication that they are successors in interest to Gulf and that, as a consequence, Mineral Interest Owners' gas has been dedicated to interstate commerce by Gulf. To the extent the Commission's decision may have been based on the assumption that Mineral Interest Owners are successors in interest to Gulf, it is in error.

In its discussion on this point, the Commission states that upon the termination of the 50-year fixed-term leases, "Gulf, *et al.*, lose their leases and their rights pass to Southland. . . ."[41] The Commission continues its argument by citing its prior decisions in *Cumberland Natural Gas Company,* and *Blair-Vreeland,* and then states that "Of course, we have determined that gas may not be withdrawn from interstate commerce by the assignment of leases from one lessee to another."[42]

[40] The portion of the Commission's decision to which this portion of Mineral Interest Owners' petition for rehearing refers reads as follows:

> Because of the termination of the 50-year leases the leaseholders, Gulf, *et al.*, lose their leases and their rights pass to Southland, *et al.*, in one case and to *Goldsmith, et al.*, in the other case. Of course, we have determined that gas may not be withdrawn from interstate commerce by the assignment of leases from one lessee to another. *Cumberland Natural Gas Company,* 34 F.P.C. 132 (1965); *Blair-Vreeland,* —— F.P.C. ——, Opinion No. 724, Docket No. CI74-331, March 18, 1975. But we do not rest our conclusion on these cases. . . .

Op. 737 at 6.

[41] *Id.*

These statements by the Commission evince a complete misunderstanding of the nature of the different property interest owned by Gulf vis-a-vis that owned by Mineral Interest Owners and the legal effect of the termination of Gulf's fixed-term lease. It is well established that a fixed-term lease and a reversionary interest are two distinct, co-existing property interests.[43] It is equally [473] well established that the owner of a reversionary mineral estate does not "succeed" to his property rights upon the termination of a lease, but rather, these property rights exist during and completely separate from the leasehold estate.[44] This principle stretches back to the earliest days of our legal heritage and is still good law today. In the words of one recent Court decision:

[42] *Id.*

[43] *See e.g., Katz v. Bakke,* 265 S.W.2d 686 (Tex. Civ. App—San Antonio 1954, err. rev.); *Union Electric Company v. Slay Bulk Terminals, Inc.,* 475 S.W.2d 136 (Mo. Ct. App—St. Louis, 1971); *Haile v. Holtzclaw,* 414 S.W.2d 916 (Tex. 1967); *Simes & Smith,* THE LAW OF FUTURE INTERESTS § 82 (2d Ed. 1956).

[44] In the words of one well-recognized authority on the subject:

> Since the reversion is merely the undisposed portion of that estate, it follows that all reversions are vested interests. It has already been pointed out that the principle factual differences which distinguishes the "vested" from the "contingent" interest is that in the case of vested future interests *there is no condition precedent to the taking effect and possession other than the termination of the preceding estate.* This, then, is one of the characteristics of the reversion.

Simes and Smith, THE LAW OF FUTURE INTERESTS § 82 at page 65 (2nd Ed. 1956) (emphasis added). *See also Haby v. Stanolind Oil & Gas Co.,* 228 F.2d 298, 305 (5th Cir. 1955).

> The ownership of the land by lessor is a present interest. The lessor is the owner of the land in fee, he is not a remainderman."[45]

[474] There simply is no "transfer", "assignment" or any other shifting of an interest from a lessee to the lessor upon the termination of a term lease.

The *Cumberland* and *Blair-Vreeland* cases referred to by the Commission are completely consistent with Mineral Interest Owners' position on this point. *Cumberland* says nothing more than that gas attributable to a leasehold interest *once dedicated* is dedicated even though all or a portion of the leasehold is transferred to another party. However, as was explained

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[45] *Union Electric Company v. Slay Bulk Terminals, Inc.*, 475 S.W.2d 136 (Mo. Ct. App—St. Louis 1971).

The Texas Supreme Court has recently given the following explanation of these general principles:

> In *Glen v. Holt*, 229 S.W. 684 (Tex. Civ. App—El Paso, 1921, no writ his.) it was stated:
>
> > "Remainders are created by deed or devise, whereas reversions are created by operation of law. It matters not how many estates are carved out of the owner's entire estate, a reversion will be left, provided they do not amount in quantity to his original estate."
>
> It is said in Thompson on Real Estate (PermEd.) Vol. 4, p. 716, § 2180, that a reversion is
>
> > ". . . [t]he residue of an estate left by operation of law and the grantor or divisor or his successors, commencing in possession of the determination of a particular estate granted or devised . . . . a reversion is never created by deed, but it arises only by implication of law, and remains vested in the sense of present fixed right of enjoyment in the future."

Haile v. Holtzclaw, 414 S.W.2d 916, 924 (Tex. 1967).

in detail there has been no dedication of any of the gas attributable to Mineral Interest Owners' reversionary fee simple mineral estate to interstate commerce because their property interest was and is completely separate from the fixed-term leasehold of Gulf. The only gas which was dedicated was that attributable to Gulf's leasehold estate, [475] all of which has been produced and delivered. If Southland were a purchaser or otherwise an assignee of Gulf's leasehold or the gas attributable thereto then, of course, *Cumberland* would be applicable. The fact is, however, in this case Mineral Interest Owners are not the assignee or successors in interest to Gulf. Indeed, there is no part of Gulf's leasehold interests to which Mineral Interest Owners could succeed, since such leasehold interest no longer exists and since all of the gas previously attributable thereto has been produced.

The Commission's decision in *Blair-Vreeland* is equally inapposite. There, as in *Cumberland,* it was determined that gas attributable to a lessee had previously been dedicated to interstate commerce and the assignee continued to be bound by this prior dedication. In this case, Mineral Interest Owners were not the assignee, or otherwise successors in interest to Gulf's leasehold.

D. *The Commission Erred In Holding That A "Service" Is Being Rendered Which Requires Abandonment Authorization.*

The Commission asserts at a number of points in Opinion 737 that a "service" has been commenced

which requires abandonment authorization before it may be discontinued. In this connection, the Commission stated in its decision that:

> "service" may not be abandoned without our permission and approval. Thus it makes no difference whether a lease is transferred or terminated, the obligation of service imposed upon the dedicated gas continues. As said in *Hunt* v. *F.P.C.*, 306 F.2d 334 342 (C.A.5, 1962), rev. on other grounds, 376 U.S. 515 (1964), the duty to continue to serve is like an ancient convenant running with the land.[46]

[476] The Commission does not specify what it means by the use of the word "service". Presumably it does not mean that once gas begins to flow from a particular source (*i.e.*, a particular well, reservoir or field), that all of the gas that ever flows from that well, reservoir or field must be delivered in interstate commerce. Such a holding would be erroneous and contrary to the position take by the Commission in all other cases.[47] As was noted above, it is quite common

[46] Op. 737 at 6. The Commission uses the word "service" at other points in its decision. For example, in discussing the *Sunray*, *supra*, case the Commission states that:

> The Court noted that the "service in which the producer engages is distinct from the contract which regulates his relationship with the transmission company in performing the service." Here a service is being rendered by Gulf to El Paso utilizing the gas in the Crane County and Hector County leases.

Op. 737 at 6. This discussion of service is also irrelevant and erroneous for the reasons set forth above.

[47] In the event the Commission is asserting that the commencement of deliveries from a particular source, such as a well, reser-

for a part of the production from a particular well to be dedicated to interstate commerce while another part of the same stream is going intrastate.

The Commission's references to an obligation to continue "service" must have reference to the principle that *once dedicated,* deliveries of the dedicated gas must continue until abandonment is granted. This appears to be what the Commission means when it says that once a service [477] obligation is undertaken, "the obligation of service *imposed upon the dedicated gas* continues." The crucial point is, of course, that the gas attributable to Mineral Interest Owners' reversionary fee simple mineral estate has never been dedicated to interstate commerce. The "service" that Gulf commenced and which it was obligated to continue was the "service" of delivering all of the gas attributable to its fixed-term leasehold estate. All of the gas attributable to Gulf's fixed-term leasehold estate has been delivered and it is physically impossible for this "service" to be continued.

The Commission is well aware that the "service" obligation imposed upon a producer of natural gas is established by the extent of the dedication of the producer's gas. If Producer A dedicates to interstate commerce the gas attributable to his 50% leasehold interest in a particular well, while Producer B dedicates to intrastate commerce the gas attributable to his 50% leasehold, then the interstate service obliga-

voir or field, automatically commits all of the gas from that well, reservoir or field to interstate commerce regardless of the terms and conditions of the dedication, Mineral Interest Owners contend that the Commission is in error for the reasons outlined above.

tion is limited to Producer A' 50% interest in the well's gas production. Here the only dedication of gas was of Gulf's leasehold estate. All of the gas attributable thereto has been produced and the leasehold has been extinguished. In contrast, none of the gas attributable to Mineral Interest Owners' fee simple mineral estate has been dedicated and therefore no "service" obligation was or could have been imposed with respect to Mineral Interest Owners' gas.

The Commission's reference to "service" in the context of the Fifth Circuit's decision in *Hunt* v. *F.P.C.,* is completely misplaced and the dicta referred to by the Commission is mischaracterized in Opinion 737.[48] In *Hunt,* the Fifth [478] Circuit cannot be read to say that the mere delivery of gas from a particular source, be it well, reservoir or field, irrevocably requires the continuation of deliveries from that particular source under all circumstances. In the thirteen years that have elapsed since the *Hunt* decision, neither the Commission nor the Courts have interpreted that decision in such a manner. Clearly what the Fifth Circuit meant when it referred to a "covenant running with the land" was the obligation or "covenant" to continue to deliver the reserves which had been dedicated to interstate commerce. Actually the Fifth Circuit's comparison of the "dedication"

[48] In the *Hunt* decision the Fifth Circuit stated:

> Like the ancient covenant running with the land, the duty to continue to deliver and sell flows with the gas from the moment of the first delivery down to the exhaustion of the reserve, or until the Commission, or on appropriate terms, permits cessation of service under Section 7(d), 15 U.S.C.A. Section 1717F(b).

Hunt v. F.P.C., 306 F.2d 334, 342 (5th Cir. 1962).

concept to the idea of a "covenant running with the land" is illustrative and supportative of Mineral Interest Owners' position in this case. The only dedication or "covenant" that has ever been made related solely to the gas attributable to Gulf's fixed-term leasehold estate. That dedication or "covenant" had no relationship to Mineral Interest Owners' completely separate reversionary fee simple mineral estate. Just as a "covenant" that is attached to one property interest (such as a fixed-term lease) cannot bind a completely separate property (such as the reversionary interest), the dedication of the gas attributable to Gulf's fixed-term leasehold estate has no relationship to or effect upon the gas attributable to Mineral Interest Owners' fee simple estate. For the above reasons, the Commission erred in holding a "service" is being or has been rendered which would require Mineral Interest Owners to obtain abandonment prior to making sales of gas attributable to their reversionary fee simple mineral estate.

E. *The Commission Erred In Unlawfully Discriminating Against Mineral Interest Owners and Depriving Mineral Interest Owners of Property Without Due Process of Law.*

As has been shown in the preceding discussion, the Commission's treatment of Mineral Interest Owners in this case is in complete contradiction to its treatment of producers in all other cases. In no other instance has the Commission held that the dedication of gas attributable to one property interest can somehow bind and dedicate the gas attributable to a completely separate and distinct property interest, particularly

when it is undisputed that there was no intention to bind and dedicate the gas attributable to the second property interest. The marked contrast between the treatment afforded Mineral Interest Owners and all other [479] producers is rendered crystal clear by comparing the Commission's decision here with that in *Bass, supra.* As has been detailed above, the principles enunciated in *Bass* are clearly applicable to the present case. Mineral Interest Owners have, in effect, been singled out for a difference in treatment which is not justified by difference in condition. Such undue discrimination by a regulatory agency is clearly forbidden as a matter of law,[49] and is in violation of the due process clause of the United States Constitution.[50]

The Commission's treatment of Mineral Interest Owners in this case also constitutes an unlawful deprivation of property in violation of the United States Constitution.[51] As the Commission is well aware, the rate for which gas can be sold in interstate commerce is a fraction of that for which Mineral Interest Owners have contracted to sell their gas to an intrastate purchaser.[52] Mineral Interest Owners are, therefore, confronted with the prospect of sustaining a tremendous financial loss as a consequence of the requirement that they commerce sales of their gas in interstate commerce even though Mineral Interest Owners are not subject to FPC jurisdiction under

[49] *See City of Chicago v. F.P.C.*, 128 U.S.App.D.C. 107, 115, 385 F.2d 629, 637 (D.C.Cir. 1967), *cert. den'd*, 390 U.S. 945 (1968).

[50] *See* U.S. CONST. Amend. V.

[51] *See* U.S. CONST. Amend. V.

[52] See footnote 12, *supra.*

these facts. For these reasons, Mineral Interest Owners contend that the Commission erred in unlawfully discriminating against Mineral Interest Owners and depriving Mineral Interest Owners of property without due process of law.

II. *The Commission Erred In Holding That Warren and Phillips Must Obtain Prior Commission Approval Before Reducing Sales of Gas to El Paso And That Certain Lessees Must Obtain Prior Commission Approval To Cease Sales To Warren.*

The Commission held in Opinion 737 that Warren and Phillips are required to obtain abandonment authority before [480] they may "reduce" sales of residue gas to El Paso. The Commission's holding on this point is in error. Although there may be a reduction in the actual volumes of residue gas delivered to El Paso, there will be no reduction in the volumes which Warren and Phillips contracted to sell El Paso and which the Commission certificated to be sold under such contract.[53] As was detailed in Mineral Interest Owners' initial brief in this case,[54] the contracts between Warren and Phillips and El Paso did not and could not include any volumes of gas attributable to the reversionary fee simple mineral estate of Mineral Interest Owners. Thus, there will be no reduction in the volumes of gas covered by and dedicated under the Warren and Phillips contrasts with El Paso and under the related certificates issued by the Commission.

[53] *See* "Initial Brief of Mineral Interest Owners" at 17-20.

[54] "Initial Brief of Mineral Interest Owners" at 4-8.

The Commission also held in Opinion 737 that, although Gulf would not have to seek prior Commission approval before it ceased sales to Warren, certain other lessees [55] who had been making sales to Warren would have to seek such abandonment authorization. The Commission appears to be stating that Gulf need not obtain abandonment of its sales to Warren, because Warren is now a wholly-owned subsidiary of Gulf and, therefore, there is actually no sale between Gulf and Warren. Although Mineral Interest Owners agree that Gulf need not obtain abandonment before discontinuing sales to Warren, Mineral Interest Owners disagree with the Commission's decision that the other lessees (all of whom obtained their rights by assignment from Gulf) must obtain abandonment authorization. Neither Gulf nor any other of the lessees must obtain abandonment before discontinuing deliveries to [481] Warren, since all of the gas which has been committed by Gulf and the other lessees has been produced and delivered. There is, in essence, nothing remaining for which abandonment must be sought. To the extent the Commission may have determined that any of the lessees were required to obtain abandonment because the Commission felt that the termination of the leases affected some type of "transfer" of dedicated gas to Mineral Interest Owners, the Commission is also in error.[56] As has been illustrated

[55] Presumably the Commission has reference to several producers which took farmouts from Gulf with full knowledge of the limitation of Gulf's fixed-term leases. See footnote 12 of "Initial Brief of Mineral Interest Owners".

[56] Such a contention was made by El Paso in its petition for a declaratory order and was refuted in detail by Mineral Interest

above, the termination of Gulf *et al.'s* fixed-term leases did not in any respect effect the transfer of any gas (or property rights) from Gulf *et al.* to Mineral Interest Owners.

Mineral Interest Owners believe that neither Gulf, Phillips, Warren nor any of the other lessees are required to obtain abandonment prior to discontinuing sales of gas to El Paso. Even if for technical reasons there is some such requirement imposed upon Gulf, Phillips, Warren or the other lessees, however, this would have no effect upon the unrelated right of Mineral Interest Owners to commence sales in intrastate commerce of gas attributable to their fee simply mineral estate. As was emphasized in Mineral Interest Owners' initial brief, since neither Gulf, Phillips, Warren nor any other lessee ever owned or sold gas attributable to the fee simple mineral estate of Mineral Interest Owners, sales of gas to Intratex from such mineral estate are completely separate from, and independent of, any Commission authorization or permission which Warren, Phillips, Gulf or any other lessees may have to obtain because of the termination of Gulf's leasehold estate. To the extent the Commission held, or implied, that Mineral Interest Owners' right to sell gas attributable to their reversionary fee simple mineral estate is in any way limited by any obligation, Gulf, Warren, Phillips or any other lessee may have to obtain abandonment authorization, the Commission was in error.

Owners at pp. 17-18 of the "Initial Brief of Mineral Interest Owners."

III. *The Commission Erred In Refusing To Include Appropriate Protective Provisions In Its Order.*

The Comission in Opinion 737 refused to include in Opinion 737 certain protective provisions which Exxon, [482] pursuant to a Motion of July 2, 1975, had urged be included in the Commission's Order. Mineral Interest Owners supported and concurred in Exxon's Motion, with certain reservations. El Paso also agreed that a protective order was needed, but contended that Exxon's language should be amended by requiring payment subject to further Commission order.

Due to the serious injury that would have been done Mineral Interest Owners by the failure of the Commission to include such protective provisions. Mineral Interest Owners on July 14, 1975 sought and obtained a temporary stay of Opinion 737 from the Fifth Circuit, insofar as the Commission failed to include appropriate protective provisions. After the issuance of this stay, certain parties to this case, including Mineral Interest Owners and the Federal Power Commission represented by its solicitor, met and agreed to an "Order Providing Interim Protective Order" which was subsequently entered by the Fifth Circuit as of July 14, 1975, and the temporary stay dissolved.[57] Under its terms, this "Order" is to be in effect until a petition for review of the final Commission Order on rehearing of Opinion 737 is filed in a Court of Appeals and any concurrently filed Motion

[57] A copy of this "Order Providing Interim Protective Order" is included as Exhibit A in Exhibit 1 attached hereto.

for stay or protective order is decided by the Court of Appeals and further judicial review is exhausted.

Mineral Interest Owners believe that the Commission erred in not including appropriate provisions in its original order to protect Mineral Interest Owners and El Paso and that it would be error to fail to include such protective provisions in the Commission's Order on Rehearing. As has been outlined in detail in this brief, Mineral Interest Owners firmly believe that the Commission is without jurisdiction over gas attributable to Mineral Interest Owners' fee simple mineral estate. Should Mineral Interest Owners be required to continue deliveries in interstate commerce without the existence of a protective order, they will be [483] faced with the possibility that, even should they prevail on appeal, the mere act of involuntary delivery pursuant to an illegal order could ultimately be deemed a dedication of the gas to interstate commerce. While Mineral Interest Owners believe that any order or decision holding that such involuntary delivery pursuant to an illegal order constituted a dedication of gas would be in error, it is unfair and highly prejudicial to Mineral Interest Owners to expose them to the possibility that a court might so find. Conversely, Mineral Interest Owners recognize that El Paso is entitled to protection in the event Mineral Interest Owners are permitted by the Commission or the courts to discontinue deliveries to El Paso and El Paso ultimately prevails on appeal.

In this connection Mineral Interest Owners and El Paso have agreed among themselves regarding appro-

priate protective provisions which should be included in the Commission's order on rehearing. A copy of such agreement is attached as Exhibit 1.[88] Section 6 of such agreement provides in pertinent part:

> El Paso and Southland agree to request the Federal Power Commission on rehearing of Opinion 737 to include in its order on rehearing and to request on appeal that the relevant appellate court issue a protective order(s) providing for the repayment of gas by El Paso to Southland in the event that Southland is successful upon rehearing or appeal and conversely for the repayment by Southland to El Paso in the event Southland is successful upon rehearing or upon appeal and it is ultimately determined that deliveries should have continued to El Paso.

[484] Accordingly, Mineral Interest Owners submit that the Commission should include in its order on rehearing protective provisions which will give effect to Paragraphs 4 and 5 of the agreement betwen El Paso and Mineral Interest Owners. We submit that these provisions are just and reasonable and in the public interest and will fully protect El Paso (and its customers) if El Paso should ultimately prevail while protecting Mineral Interest Owners if they should prevail.

---

[88] The agreement attached is between Southland and El Paso. Due to the large number of people and the distances involved, the other Mineral Interest Owners and El Paso have not yet executed a formal document regarding protective provisions. The remaining Mineral Interest Owners and El Paso have, however, agreed in principle to the execution of formal documents which are, in substance, identical to that executed by Southland.

Mineral Interest Owners wish to make it clear that by urging and agreeing to the entry of protective provisions as described above, that it is not in any way recognizing that the Federal Power Commission has any jurisdiction whatsoever over volumes of gas which Mineral Interest Owners may deliver to El Paso under compulsion of Opinion 737 or any other effective order of the Commission or the courts. Mineral Interest Owners further wish to make it clear that Mineral Interest Owners urging of and agreement to the entry of appropriate protective provisions as described above will be without prejudice to any substantive or procedural rights Mineral Interest Owners may have or may assert including, but not limited to, the right of Mineral Interest Owners to seek judicial review of Opinion 737 and the order on rehearing of Opinion 737 or any other effective order of the Commission or the courts and that Mineral Interest Owners will have the right to obtain at any time a stay or other protective or remedial orders from the Commission or the courts. Furthermore, Mineral Interest Owners' urging of and agreement to the entry of appropriate protective orders as described above is not intended to nor should in any way be construed to constitute an admission by Mineral Interest Owners that El Paso has any right to purchase any of the gas which Mineral Interest Owners deliver to El Paso under the compulsion of Opinion 737 or any other effective order of the Commission or the courts, it being understood that such gas is being delivered to El Paso solely under the compulsion of Opinion 737 or any other effective order of the Commission or the courts and that such delivery shall

not constitute a dedication of any gas of Mineral Interest Owners to the interstate market. Mineral Interest Owners further state that they shall be free to discontinue deliveries of gas to El Paso made under the compulsion of Opinion 737 or any other effective order of the Commission or the [485] courts whenever such compulsion ceases and that they intend to discontinue such deliveries as soon as such compulsion is relieved.

Mineral Interest Owners believe that the Commission has the power under the Natural Gas Act to enter such an order. In addition, it appears that the principal parties, including El Paso and Mineral Interest Owners, are in agreement that the entry of an appropriate protective order is necessary and in the public interest in this case.

Conclusion

For each and all of the foregoing reasons, Mineral Interest Owners respectfully pray that the Commission grant this Application for Rehearing of Opinion 737 in accordance with the grounds and reasons set forth above and upon rehearing issue an order (1) declaring that Mineral Interest Owners are not obligated to obtain abandonment authorization under Section 7(b) of the Natural Gas Act before making sales in intrastate commerce of casinghead gas attributable to Mineral Interest Owners fee simple mineral estate in certain properties located in Crane County, Texas, (2) declaring that neither Gulf, Warren, Phillips nor any of the other lessees must obtain prior Commission approval to cease sales to Warren, Phil-

lips or El Paso, and (3) including the protective provisions requested above.

Respectfully submitted,

/s/ Henry S. May, Jr.
J. Evans Attwell
Henry S. May, Jr.
Francis J. Coleman
Vinson, Elkins, Searls,
Connally & Smith
2500 First City National
Bank Building
Houston, Texas 77002

[486]

Platt W. Davis, III
William M. Sawyer
Vinson, Elkins, Searls,
Connally & Smith
1701 Pennsylvania Avenue,
Suite 1120
Washington, D. C. 20006
Attorneys for
Mineral Interest Owners

Date: August 8, 1975

[487] (Verification Omitted in Printing)

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[488] (Certificate of Service Omitted in Printing)

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[489] EXHIBIT 1

SOUTHLAND ROYALTY COMPANY
1600 First National Building
Fort Worth, Texas 76102

August 4, 1975

El Paso Natural Gas Company
Box 1492
El Paso, Texas 79978

Re: Waddell Interim Agreement Between
Southland Royalty Company and
El Paso Natural Gas Company

Gentlemen:

At midnight on July 14, 1975, the 50-year fixed-term oil and gas leases held by Gulf Oil Corporation in Crane County, Texas, terminated. Southland Royalty Company ("Southland") holds fee simple title to its pro rata share of the mineral estate underlying the acreage previously covered by such leases. *Gulf Oil Corp.* v. *Southland Royalty Co.*, 496 S.W.2d 547 (Tex. Sup.Ct. 1973).

By Opinion No. 737 issued July 11, 1975, in *El Paso Natural Gas Company*, Docket No. CP75-209, the Federal Power Commission held that in the absence of obtaining abandonment authorization under Section 7(b) of the Natural Gas Act, Southland may not sell in intrastate commerce certain quantities of gas attributable to the fee simple mineral interests which Southland holds upon termination of Gulf's 50-year fixed-term oil and gas leases. As evidenced by its briefs in Docket No. CP-75-209, Southland is firmly con-

vinced that it is not required to obtain any prior Commission authorization in order to make sales in intrastate commerce of any gas attributable to its fee simple mineral interests. Therefore, Southland intends to promptly seek rehearing of Opinion 737 and, if rehearing is denied, to promptly seek judicial review of Opinion 737 and any Commission order denying rehearing thereof. However, in the absence of favorable action by the Commission on rehearing, the obtaining of a judicial stay or reversal of Opinion 737 or some other event or action, either administrative, judicial or legislative, removing the compulsion imposed by Opinion 737 to continue deliveries, Southland, under the compulsion of Opinion 737 and the penalties prescribed in the Natural Gas Act, will have to continue to make deliveries of quantities of casinghead residue gas in interstate commerce. Accordingly, the question arises as to the price to be tendered by El Paso for any gas delivered by Southland under the compulsion of Opinion 737 or any other effective order of the Commission or the courts.

[490] 1.

Subject to the disclaimers and reservations set forth below, it is mutually agreed that the price to be tendered by El Paso for any such gas delivered by Southland under the compulsion of Opinion 737 or any other effective order of the Commission or the courts shall be the higher of:

(1) An initial rate which shall consist of the sum of 76.5¢/Mcf plus 1.5¢/Mcf for gathering plus reimbursement for all existing and any new or increased production, severance, or similar taxes,

BEST COPY AVAILABLE

which initial rate shall be adjusted proportionately upward or downward as the total gross heating value of such gas varies from one thousand (1,000) Btu per cubic foot (saturated with water vapor at 60°F. and 14.73 Psia), provided, further, that such initial rate shall be increased by 1.5¢/Mcf per annum on January 1 of each year hereafter; or

(2) One hundred fifty percent of the just and reasonable national rate, including all permitted escalations, reimbursements and redeterminations, as prescribed by the Commission from time to time in Docket R-389-B, or any successor proceeding involving the establishment of just and reasonable national rates; or

(3) Any rate higher than that specified elsewhere in this paragraph which El Paso shall, as a consequence of legislative, regulatory, or judicial action or otherwise, become permitted to pay producers such as Southland.

It is understood and agreed that if El Paso is prevented by the Federal Power Commission from including the cost of gas paid for pursuant to the provisions of this paragraph in El Paso's rates to its customers, Southland shall refund to El Paso the amount so disallowed by the Federal Power Commission pursuant to a final nonappealable order plus interest on such amounts at the rate of 7% per annum.

2.

It is understood that this letter shall be in effect on a day-to-day basis and only for so long as Southland

shall make deliveries under the compulsion of Opinion 737 or any other effective order of the Commission or courts, it being recognized that as soon as such compulsion ceases Southland intends(and is contractually obligated) to make sales and deliveries of the subject gas to an intrastate pipeline purchaser.

3.

The execution of this agreement by Southland and its acceptance of the price provided herein for any deliveries of gas to El Paso under the compulsion of Opinion 737 or any other effective order of the Commission or the courts is not intended to and shall not be [491] construed as recognition that the Federal Power Commission has any jurisdiction whatsoever over volumes of gas which Southland delivers to El Paso under compulsion of Opinion 737 or any other effective order of the Commission or the courts, it being expressly understood and agreed that the payment of such price by El Paso and receipt thereof by Southland shall be without prejudice to any substantive or procedural rights Southland may have or may assert including, but not limited to, the rights of Southland to seek rehearing and judicial review of Opinion 737 or any other effective order of the Commission or the courts, and the rights of Southland to obtain at any time a stay or other protective or remedial orders from the Commission or the courts. Moreover, neither the execution of this agreement nor the acceptance by Southland of the price provided herein for deliveries of gas to El Paso under the compulsion of Opinion 737 or any other effective order of the Commission or the courts is intended to or shall in any way be

construed to constitute an admission by Southland that El Paso has a right to purchase any of the gas which Southland delivers to El Paso under the compulsion of Opinion 737 or any other effective order of the Commission or the courts, it being understood and agreed that such gas is being delivered to El Paso solely under the compulsion of Opinion 737 or any other effective order of the Commission or the courts and that such deliveries shall not constitute a dedication of any gas of Southland to the interstate market. Southland shall be free to discontinue deliveries of gas to El Paso made under the compulsion of Opinion 737 or any other effective order of the Commission or the courts whenever such compulsion ceases.

4.

It is further understood and agreed that in the event Southland shall prevail upon rehearing of Opinion 737 or upon appeal or shall otherwise be relieved of the compulsion imposed by Opinion 737 or any other effective order of the Commission or the courts and thereby Southland shall be relieved of the compulsion to continue deliveries in interstate commerce, and it shall be later ultimately determined by a final nonappealable order of the Commission that Southland should have continued to make such deliveries, then upon the issuance of an appropriate final, nonappealable Commission or court order declaring that the delivery of repayment volumes shall not constitute a dedication of any gas reserves from which such repayment volumes are delivered, Southland will repay volumes of gas it should have delivered to El Paso but which were not actually delivered during the

period when the compulsion of Opinion 737 or any other effective order of the Commission or the courts was not in effect, provided that such repayment by Southland shall be subject to the following conditions:

(a) the payback volumes shall be in accordance with the specifications and conditions set forth in Exhibit B are to be delivered in an equitable manner over a reasonable period of time at a mutually agreeable point or points on El Paso's pipeline facilities.

(b) El Paso shall pay for such repaid volumes of gas pursuant to the pricing provisions set forth in this letter as in effect at the time of repayment by Southland;

[492] (c) repayment of gas pursuant to this paragraph shall not (i) limit or affect the right of Southland to seek further Commission or judicial review of and action on Opinion 737 or any other effective order of the Commission or the courts, (ii) prejudice or limit any substantive or procedual rights that Southland may have as specified in this letter or otherwise, (iii) constitute recognition that El Paso has the right to purchase any of the gas so repaid, (iv) constitute recognition that the Federal Power Commission has any jurisdiction whatsoever over such volumes of gas or, (v) constitute a dedication of such gas to interstate commerce;

(d) Southland shall not be obligated to repay gas to El Paso in the event Southland has insufficient available gas production to make such repayment from properties owned by Southland in Crane

County, Texas, on the effective date of this letter agreement, provided, however, that Southland represents (i) that it is entitled under an agreement dated February 7, 1975, between Southland and Intratex Gas Company, a Texas corporation, to use certain natural gas production attributable to certain properties (in addition to the natural gas production that is the subject of Opinion 737) owned by Southland on the effective date of this letter agreement for purposes of repayment under the circumstances described in this paragraph and that (ii) Southland will not relinquish this contractual right, and provided, further, that Southland may at its discretion make repayment with gas production from properties other than those owned by Southland in Crane County, Texas, on the effective date of this letter agreement; and

(e) if for any reason the compulsion under which Southland is making repayment pursuant to this paragraph shall cease, Southland may immediately discontinue such repayment and El Paso shall be obligated to, in turn, repay to Southland in gas for any repayment volumes delivered to El Paso, which repayment by El Paso shall be pursuant to the provisions of paragraph 5 of this letter.

5.

If Southland should seek rehearing of Opinion 737 or judicial review of a final order on rehearing of Opinion 737 and upon rehearing or review or after subsequent administrative hearings it should be ultimately determined by a final nonappealable order that

the gas which is delivered to El Paso in compliance with Opinion 737 or any other effective order of the Commission or the courts could have been sold to others than El Paso without Southland obtaining abandonment authority from the Commission, then any deliveries by Southland or receipt of payment therefor in compliance with Opinion 737 and any other effective order of the Commission or the courts shall not have constituted a dedication of any of Southland's gas to the interstate market; further El Paso shall be required upon the effective date of any such final nonappealable order or decision determining that deliveries could [493] have been made to others than El Paso without Southland obtaining abandonment authority from the Commission to repay Southland in gas for the deliveries made to it in compliance with Opinion 737 and any other effective order of the Commission or the courts. Such repayment is to be made by El Paso subject to the following conditions:

(a) the payback volumes are to be delivered in an equitable manner over a reasonable period of time, subject to further Commission order as to scheduling but not as to entitlement if El Paso and Southland cannot agree as to such scheduling;

(b) payback by El Paso shall be at or near the Waddell Gasoline Plant in Crane County, Texas, or such other point as shall be mutually agreeable to Southland and El Paso;

(c) Southland shall return to El Paso the monies paid for the volumes represented by such payback volumes, such repayments to be made within thirty (30) days following the end of each calendar

month during which payback volumes are delivered by El Paso;

(d) the payback volumes shall not be considered to be jurisdictional gas and acceptance thereof by Southland, or any of its customers, shall not subject any of them to Commission jurisdiction; and

(e) if for any reason it shall be determined that Southland was under a continuing compulsion to deliver gas to El Paso and that, as a consequence, El Paso need not repay gas to Southland, El Paso may immediately discontinue such repayment and Southland shall be obligated to in turn repay El Paso in gas for any repayment volumes delivered to Southland, which repayment by Southland shall be pursuant to the provisions of Paragraph 4 of this letter.

6.

El Paso and Southland agree to request the Federal Power Commission on rehearing of Opinion 737 to include in its order on rehearing and to request on appeal that the relevant appellate court issue a protective order(s) providing for the repayment of gas by El Paso to Southland in the event that Southland is successful upon rehearing or appeal and conversely for the repayment by Southland to El Paso in the event Southland is successful upon rehearing or upon appeal and it is ultimately determined that deliveries should have continued to El Paso. The substance of such requested protective order(s) shall be as set forth in paragraphs 4 and 5 of this letter. The failure of the Commission or any appellate court to include the protective language requested pursuant to the preceding

sentence shall not, however, affect the rights and obligations as set forth in this letter and agreed to by El [494] Paso and Southland. It is further agreed by El Paso and Southland that the payback provisions contained in paragraphs 4 and 5 of this letter shall be the sole measure of damages and liability as between El Paso and Southland for harm that may have been done to Southland on the one hand by the receipt by El Paso of gas delivered by Southland under the compulsion of Opinion 737 and any other effective order of the Commission or the courts, or to El Paso on the other hand as a consequence of Southland's failure to deliver gas in interstate commerce which it is ultimately determined by a final nonappealable order should have been delivered to El Paso, provided, however, that this sentence shall in no event relieve Southland or El Paso of their obligation to repay volumes of gas as provided in this letter or limit or abrogate the right of El Paso or Southland to seek monetary damages for the market value (determined in the case of El Paso seeking damages from Southland by reference to the price that the gas for which repayment is being sought was sold for intrastate commerce at the time of production less the price which El Paso would have paid for such gas at the time of production, and in the case of Southland seeking damages from El Paso by reference to the price that the gas for which repayment is being sought could have been sold for in intrastate commerce at the time of production less any amount which Southland actually received in payment for such gas) of the gas plus interest which either El Paso or Southland shall fail or be unable to repay as provided in paragraphs 4 and 5 of this letter.

7.

It is recognized that certain parties to Docket No. CP75-209, including Southland and El Paso, and the solicitor of the Federal Power Commission have agreed to the entry of an "Order Providing Interim Protective Order," in *Southland Royalty Co.* v. *F.P.C.*, Docket No. 75-2851, —(5th Cir.) a copy of which is attached as Exhibit A. Nothing in this letter is intended to alter the effect of such "Order Providing Interim Protective Order" or the rights and obligations set forth therein.

8.

Deliveries of gas by Southland and payment therefor by El Paso shall be made pursuant to the General Terms and Conditions set forth in Exhibit B attached to this letter.

If the foregoing is agreeable to El Paso, would you please so indicate by signing the attached copy of this letter in the space provided below and returning the same to the undersigned at your earliest convenience.

Yours very truly,

SOUTHLAND ROYALTY COMPANY

By /s/ I. JON BRUMLEY
I. JON BRUMLEY, *President*

AGREED TO AND ACCEPTED
this 7th day of August, 1975.
EL PASO NATURAL GAS COMPANY

[495]

EXHIBIT A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-2851

SOUTHLAND ROYALTY COMPANY, ET AL, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

(FILED JULY 21, 1975)

Order Providing Interim Protective Order

Having considered the Motion of Southland Royalty Company, *et al.* ("Southland"), and an agreement of parties, including also El Paso Natural Gas Company ("El Paso") and Southland in *Exxon Corporation* vs. *Federal Power Commission,* No. 75-1118 in the United States District Court for District of Columbia, it is Ordered that:

The Court's temporary stay issued in this proceeding on July 14, 1975, is hereby vacated and the following is substituted therefor:

> If Southland or Exxon Corporation ("Exxon") should seek review of a final order on rehearing of Opinion No. 737 and upon review it should be ultimately determined that the gas which is delivered to El Paso in [496] compliance with Opinion No. 737 could have been sold to others than

El Paso without Southland or Exxon obtaining abandonment authority from the Commission, then any deliveries by Southland, Exxon, or the other mineral interest owners during the period this order is in effect shall not have constituted a dedication of their gas to the interstate market and acceptance of monies paid for gas delivered during the period this order is in effect shall not prejudice the rights of Southland or Exxon or the other mineral interest owners to claims for any rate different from the rate tendered by El Paso or other rights in the premises; further, El Paso shall be required to repay Southland, Exxon, and the other mineral interest owners in gas for the deliveries made to it during the period this order is in effect. Such repayment is to be made by El Paso subject to the following conditions: (a) the pay-back volumes are to be delivered in an equitable manner over a reasonable period of time, subject to further Commission order as to scheduling but not as to entitlement if El Paso, Southland and Exxon cannot agree as to such scheduling; (b) Southland, Exxon, and the other mineral interest owners shall return to El Paso the monies paid for such pay-back volumes, such repayments to be made within thirty (30) days following the end of each calendar month during which pay-back volumes are delivered by El Paso; and (c) the pay-back volumes shall not be considered to be jurisdictional gas and acceptance thereof by Southland, Exxon, or the other mineral interest owners, or any of their customers, shall not subject any of them to Commission jurisdiction.

This order shall be effective until a petition for review of the final Commission order on rehearing of Opinion No. 737 is filed in a court of appeals and any concurrently filed motion for stay or protective order is decided by the court of appeals and further judicial review is exhausted; provided that any obligations incurred under the temporary stay of July 14, 1975, as superseded above, shall continue in effect.

The FPC has represented that it does not concede that the Court has jurisdiction to enter a protective order in this matter; [497] however, in order to settle a controversy and inasmuch as the Court has determined to act, the FPC has represented that it believes that the foregoing provisions are the most equitable manner of preserving the *status quo* and will not move to vacate this order.

Entered as of this 14th day of July, 1975.

/s/ JAS. P. COLEMAN
Judge
United States Court of Appeals

Consented to by:

/s/ PLATT W. DAVIS, III
Platt W. Davis, III
Counsel for Southland Royalty Company, *et al.*

/s/ SHERMAN S. POLAND
Sherman S. Poland
Counsel for Exxon Corporation

/s/ C. FRANK REIFSNYDER
C. Frank Reifsnyder
Counsel for El Paso Natural Gas Company

/s/ ALLAN ABBOT TUTTLE
Allan Abbot Tuttle
Solicitor
Federa' Power Commission

[498]

EXHIBIT B

General Terms and Conditions To Apply To Waddell Interim Agreement Between Southland Royalty Company and El Paso Natural Gas Company

1.

These General Terms and Conditions are made subject to the letter agreement between El Paso and Southland dated August 4, 1975, to which these General Terms and Conditions are appended and, in the event of any conflict or ambiguity, the letter agreement between El Paso and Southland dated August 4, 1975, shall control.

2.

The delivery of gas hereunder shall begin at 12:01 a.m. on July 15, 1975, and shall continue on a day-to-day basis. These provisions shall apply only to such residue gas attributable to casinghead gas that Southland shall make available for delivery to El Paso at the outlet of the Warren Petroleum Company Gasoline Plant in Crane County, Texas. Nothing in these provisions or in the letter dated August 4, 1975, shall be construed to limit the manner in which Southland or its designee operate their gas-producing properties and gas processing facilities.

3.

The point of delivery of gas delivered hereunder shall be at the inlet of El Paso's gas measurement facilities located adjacent to Warren Petroleum Com-

pany's Waddell Gasoline Plant in Crane County, Texas.

4.

Southland will deliver gas hereunder at a pressure sufficient to enter El Paso's gathering system against the working pressure maintained therein from time to time at the point of delivery, provided such working pressure shall not exceed six hundred (600) psig, and provided further that neither Southland nor El Paso shall be obligated to install compression facilities in order to deliver gas hereunder, but either may do so at its option.

5.

The gas delivered hereunder shall be merchantable natural gas and shall have a total gross heating value of not less than one thousand (1,000) Btu per cubic foot. Such gas [499] shall not contain more than one-quarter (¼) grain of hydrogen sulphide nor more than five (5) grains total sulphur (mercaptans) per one hundred (100) cubic feet; two percent (2%) by volume of carbon dioxide nor more than two-tenths (0.2) of one percent (1%) by volume of oxygen. Southland shall install, at its sole cost and expense, all separators and/or other devices which may be found necessary to prevent hydrocarbons and water in their liquid state from entering El Paso's gathering system at the point of delivery hereunder. If any gas delivered hereunder fails to meet any one of said quality requirements, then El Paso shall have the right, at its option, to refuse to accept such gas.

6.

On or before the tenth (10th) day of each calendar month, El Paso shall render to Southland a statement showing the total volume of gas measured in El Paso's meter station during the preceding calendar month, and on or before the twenty-fifth (25th) day of the calendar month in which such statement is rendered, shall tender its check for payment for all gas received hereunder during such calendar month. The statement and check shall be mailed to:

Southland Royalty Company
1600 First National Bank Building
Fort Worth, Texas 76102

Each party hereto shall have the right at all reasonable times to examine the books and records of the other party to the extent necessary to verify the accuracy of any statement or computation made under or pursuant to these General Terms and Conditions. Any statement shall be final as to all parties unless questioned within one (1) year after payment thereof has been made.

7.

Any expense incurred in connection with the purchase and receipt of gas shall be borne by El Paso, and any expenses incurred in making the delivery and sale shall be borne by Southland, provided, however, that El Paso shall, as set forth in the attached letter dated August 4, 1975, reimburse Southland for all severance, production and similar taxes levied on such gas prior to the delivery thereof to El Paso.

8.

Measurement of gas delivered hereunder and related activities will be performed by El Paso in facilities installed by El Paso in accordance with the American Gas Association Gas Measurement Committee Report No. 3, Revised 1969, as amended from time to time, provided however, that Southland may install check measuring equipment.

9.

[500] The unit of Volume for purposes of measurement of gas delivered hereunder shall be one (1) cubic foot of gas at a temperature base of sixty degrees (60°) F. and at a pressure base of fourteen and seventy-three hundredths pounds (14.73 lbs.) per square inch absolute. Atmospheric pressure shall be assumed to be thirteen and two-tenths pounds (13.2 lbs.) per square inch absolute. Volumes shall be determined in accordance with American Gas Association Gas Measurement Committee Report No. 3, Revised 1969, as amended from time to time. Gas delivered hereunder shall be sampled by El Paso within ten (10) days of the date of first deliveries and tested by appropriate laboratory analysis for purposes of determining the total gross heating value thereof, and such determination shall be made every three months thereafter.

10.

Southland warrants title to all gas deliveries hereunder and its right to deliver same and warrant that such gas shall be free and clear of all liens and adverse claims.

11.

Southland shall be in control and possession of the gas covered hereby until it shall have been delivered at the point of delivery, and thereafter, El Paso shall be in control and possession thereof.

El Paso shall have no responsibility with respect to any gas deliverable to it hereunder until it is delivered at the point of delivery hereunder or on account of anything which may be done, happen or arise with respect to said gas before such delivery, and Southland shall have no responsibility with respect to such gas after its delivery or on account of anything which may be done, happen or arise with respect to said gas after such delivery.

12.

Each party hereto shall be excused from performing pursuant to these General Terms and Conditions, other than to make payments for gas delivered hereunder, to the extent it is rendered unable to perform by a force majeure situation, but only for the period of time such force majeure situation continues. The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests, breakage or accident to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells or plant operations, breakage of gathering or transmission lines, and other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and

which by the exercise of due diligence such party is unable to prevent or overcome.

[501] 13.

Any notice provided for or permitted in these General Terms and Conditions shall be deemed sufficiently given and served when and if deposited in the United States mail, postage prepaid and registered, addressed to Southland at the address referred to in paragraph 6 hereof, or to El Paso at P.O. Box 1492, El Paso, Texas 79978, as the case may be, or to such other address as either party shall respectively hereafter designate in writing. Routine communications, including monthly statements and payments, shall be considered as duly delivered when mailed by either registered mail or ordinary first class mail, postage prepaid.

—END—

[502] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

(FILED AUGUST 8, 1975)

Application of Exxon Corporation for Rehearing of Opinion No. 737

Exxon Corporation, an intervenor and party-in-interest in Docket No. CP75-209 applies, pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, for rehearing of the Commission's "Declaratory Opinion and Order on Termination of Long-Term Leases" issued in these proceedings on July 11, 1975. In support of this application for rehearing, Exxon shows as follows:

A. *The Commission Erred in Holding that Gulf Dedicated Exxon's Mineral Interest*

In its Opinion No. 737 the Commission held that the action of a lessee, Gulf Oil Corporation (Gulf), in selling its interest in production from leasehold properties also committed the interest of mineral fee owners, such as Exxon and Southland Royalty Company (Southland), in production after termination of the lease. According to the Commission, the lessee dedicated Exxon's interest because Gulf rendered

"service" which may not be abandoned without Commission approval under Section 7(b) of the Act. The Commission's conclusion is based upon a number of misconceptions of fact and law and is fundamentally wrong. The Commission fails to address the question of how the mineral interest owners succeed to the lessee or how a lessee can encumber the rights of the lessor in the property after termination of the lease—concepts totally foreign to real property law. In the final analysis, the Commission assumes its conclusion through asserting that Gulf performed a "service" which is imposed upon Exxon's gas. The Commission asserts that because Gulf's sale was a "service", dedication of Gulf's production from its leasehold interest somehow extends beyond that interest and commits the production of Exxon and the other mineral owners.

[503] No explanation is provided as to how, by denominating Gulf's sale as a service, Gulf was empowered to dedicate interests which it did not own. Yet, obviously, even when one assumes that Gulf's sale constituted a "service" the question of the extent of dedication of that "service" remains unanswered.

The Commission's "reasoning" appears to be that Exxon must obtain abandonment authorization because the gas is dedicated to service to El Paso. The gas is dedicated because Gulf performed a service, and under Section 7(b) a service cannot be abandoned without authorization. The circularity of reasoning is obvious. The Commission provides no logical or legal basis for its conclusion.

It is no answer to conclude that because Gulf performed a service it did, or legally could, dedicate the

interests of the owners of the mineral fee. Nor is it any answer to declare that the "service imposed upon the dedicated gas continues", for the fundamental question remains, can a lessee dedicate gas for a service beyond the extent of its legal interest[1]

No rationale or reasoning was advanced to show why or how Gulf's sale (service) of production from its interest dedicated the interests of Exxon.[1] This failure to provide subsidiary findings and to articulate the reasons for its decision with reasonable clarity is, in itself, error. Section 8(b) of the Administrative Procedure Act 5 U.S.C. §557(c); *Baltimore & Ohio R. Co.* v. *Aberdeen & RR Co.*, 393 U.S. 87, 92 (1968).

[504]

B. *The Commission Erred in Holding That Exxon Succeeded to the Interest of Gulf*

Opinion No. 737 is replete with instances where the Commission assumed that Exxon has succeeded

[1] A corollary question could be posed:

If a lessee can commit a greater interest than he owns, does a lessee owning a partial working interest but selling the full well stream prior to sale by a co-owner of another working interest, commit the interest of the co-owner? Or, does a lessee commit the interest of an adjacent leaseholder? The obvious answer in both cases is that the lessee does not commit the interest of others because he cannot do so and, accordingly, dedication under the Natural Gas Act is no greater than the interest of the seller. Of course, in both instances suggested above the lessee would be required to obtain abandonment authorization if he wished to discontinue the sale of *his* interest, but neither the lessee, nor the co-owner, nor the adjacent leaseholder would be required to obtain abandonment before he could sell his interest, and the Commission could not force the co-owner or adjacent leaseholder to sell his gas in interstate commerce.

to the interest of Gulf. Of course, it has not. Exxon's interest as owner of a mineral fee is completely independent of the lessee's interest. In no sense is Exxon a successor-in-interest. The Commission's error is reflected in its repeated reference to the mineral interest owners' production from "leaseholds".[3] The leaseholds ceased to exist at midnight July 14, 1975. Exxon does not produce any gas from a leasehold. Likewise, in error is the Commission's declaration (p. 6) that at the termination of the 50-year leases the leaseholders, Gulf, *et al.*, "lose their leases and their rights pass to Southland, *et al.*". The leases terminated on July 14, 1975, but Gulf passed no rights or obligations to the lessors. All rights and obligations under the lease ceased. Nothing passed to the lessors. The Commission's failure to recognize this fundamental concept let it into error whereby it has incorrectly assumed that Exxon and other mineral interest owners are analogous to successor lessees under a lease.

The Commission's reliance upon *Atlantic Refining Co.* v. *FPC,* 360 U.S. 378 (1959) and *Sunray Mid-Continent Oil Co.* v. *FPC,* 364 U.S. 170 (1960) are illustrations of this basic misconception. Of course, neither case involved a question whether a lessee, by making a sale, committed an interest greater than that which it owned. In CATCO, the Court was merely referring to the fact that when the Commission tenders a certificate to the producer-lessee before inception of deliveries, the producer-lessee is free to reject because there has been no dedication of *its interest* prior to commencement of deliveries. There is no question here but that Gulf, after deliveries

[3] See pp. 2, 3, 5, and 7.

began, was not free to reject a certificate or the terms upon which it was authorized to sell *its interest.*[3] Likewise, in *Sunray,* the Court's holding was merely that a certificate [505] need not be limited by the term of sales contract. Nothing in that case can be construed to hold that a dedication of a producer-lessee's interest under a certificate also dedicates the reversionary interest of the mineral fee owner.

Similarly, the off-hand reference to a covenant running with the land in *Hunt* v. *FPC,* 306 F.2d 334, 342 (5th Cir. 1962) cannot reasonably be construed to imply that a lessee commits more than his interest under his lease. In *Hunt* the Court was emphasizing the fact that the Commission could not, by means of a price condition in a temporary certificate, eliminate a producer-seller's right to file for contractually authorized rate increases. In this connection it noted that commencement of service under the temporary certificate dedicated the seller's interest, but that such dedication did not deprive him of his rights under Section 4. The question of dedication of the interest of a mineral fee owner by a lessee was not even remotely involved.[4]

[3] We recognize that Gulf, as a percentage seller under the initial arrangement would not be required to obtain a certificate for its sale to Warren Petroleum Corporation. We also recognize that, at some point, the sale by Gulf to Warren ceased when Warren became a corporate division of Gulf.

[4] Since it is customary in the large majority of oil and gas leases to provide that the lease may be maintained by production, cases such as CATCO, Sunray, and Hunt are premised upon the assumption that the leases there involved continue for the life of production.

The Commission has also misconstrued the impact of *Mobil Oil Corp.* v. *FPC,* 463 F.2d 256 (D.C. Cir. 1972)* as it relates to the issue presented here. There is no question here of royalty payments being taken in kind during the term of the lease. Thus, the Commission's claim (p. 6) that, under *Mobil,* a royalty owner desiring to take his gas in kind during the lease term would need prior abandonment authority completely misses the point. The [506] importance of *Mobil* is its holding that the royalty owner who does not take payments in kind is not a seller under the lease. Consequently, dedication by the lessee *of its interest* does not carry with it a dedication of the royalty owners (lessor's) interest when the lease terminates (463 F.2d at 462, see Exxon Initial Br. p. 7). It follows that since there has been no dedication of the lessor's interest by the lessee, the lessor cannot be required to obtain abandonment authorization of an interest which has not been dedicated.

The Commission's attempt to restrict the reasoning of *El Paso Natural Gas Co.* v. *Perry R. Bass,* 48 FPC 1269 (1972) to its specific facts only points to further error—arbitrary and discriminatory treatment against

* On page 6 of Opinion No. 737 the Commission makes reference to the Mobile case in a context where it is obvious that it was referring to the Mobil case at 463 F.2d 256 which involved Commission jurisdiction over royalty payments. The Mobile case, United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 338-339 (1956) holds that relationships between the parties are established initially by their contracts which are subject to review by the Commission. In its brief Exxon referred to the Mobile case in support of its position that the Commission cannot compel it to contract for the sale of its gas to El Paso (see Exxon Initial Br. p. 5). The Commission does not come to grips with this issue and its failure to do so constitutes additional error.

Exxon and the other mineral interest owners. The Commission asserts that in *Bass* the lessee intended only to dedicate its interest in the leasehold which would be subject to the ripening of Bass's interest based upon a condition subsequent. But nowhere does the Commission show where or how Gulf intended to commit more than its interest in the production from its leasehold for the 50-year term of the lease. The Commission's explanation that the *Bass* rationale should "not [be] extended to the difficult situation here involved", is no substitute for legal analysis. Properly analyzed, no extension of the rationale which controlled *Bass* is involved here. Both *Bass* and this proceeding are governed by the same basic concept that a lessee can dedicate no interest greater than the interest which he owns. To deny this concept, as the Commission does here, is to assert jurisdiction far beyond the confines of the Natural Gas Act.

On page 7 of Opinion No. 737 the Commission, states that "Section 7(b) applies to the sale of gas from the dedicated reserves in the two leaseholds involved until they are exhausted." The simple fact is that the dedicated reserves, that is, those in which Gulf had an interest, have been exhausted. They were exhausted when the leaseholds expired. The Commission's reference to leaseholds as if they continue to exist is clearly erroneous.

C. *The Commission Erred in Holding That Exxon's Fifth Amendment Rights Are Not Violated*

The Commission's assertion (p. 6) that it is not denying Exxon of property without due process by requiring it to obtain abandonment authorization for

a sale or service it has never entered into, constitutes further error. As we noted in our initial brief (pp. 3-6), the requirement [507] that Exxon make a sale to El Paso of gas produced from its mineral fee at the termination of Gulf's leasehold interest does, in and of itself, constitute an unlawful taking in violation of the Fifth Amendment to the U.S. Constitution. Exxon is not in the position of a seller who has already committed his gas to the interstate market. To force Exxon to sell its interest to El Paso through an assertion that Section 7(b) applies is to require that Exxon enter into a contract, constructive or otherwise, for an initial commitment of its interest. Such a requirement is beyond the power of the Commission to impose. *Southern Louisiana Area Rate Cases,* 428 F.2d 407 42● (5th Cir. 1970); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332, 338-339 (1956); *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 365 U.S. 1, 17 (1961). The fact that Exxon might receive a regulated rate if it were required to contract with El Paso for the sale of its gas does not eliminate the Constitutional invalidity of the Commission's action. The taking results from forcing Exxon to initiate a jurisdictional sale. Cases which uphold economic regulation of an activity voluntarily undertaken simply are not apposite (see Exxon Initial Br. pp. 5-6).

D. *The Commission Erred in Failing to Recognize the Effects of Texas Law*

Although the Commission sketches its opinion in terms of Section 7(b) of the Act, the ultimate effect is to alter real property law of the State of Texas. In holding that the lessee has encumbered the interest

of the mineral fee estate, the Commission has changed basic relationships established under Texas law. In other circumstances, the Commission claimed jurisdiction, under Section 7(c), over royalty owners, brushing aside a claim that such action was contrary to state property law (*Denman* v. *J. M. Huber Corp.,* Opinion No. 562, 42 FPC 164 (1969)). In reversing the Commission, the Court of Appeals held that [*Mobil Oil Corp.* v. *FPC,* 463 F.2d 256 at 262 (D.C. Cir. 1972)]:

> "To refer to the royalty owner as engaging in the sale is to depart from common understanding of the words used, industry parlance, economic equivalent, or any other foundation hitherto considered a source for discerning Congressional intention."

By the same token, the Commission's holding that a lessee may encumber the mineral fee estate arising after termination of the lease departs from common understanding, including local law, and cannot be countenanced. The Commission must recognize that when questions of local law [508] are involved, the law of the state is controlling. *Erie RR Co.* v. *Tompkins,* 304 U.S. 64 (1938).

E. *The Commission Should Provide Protective Relief Pendite Lite*

By motion filed July 2, 1975, Exxon proposed a form of protective order which would afford protection to all parties pending review. In Opinion No. 737 the Commission did not question the validity or purpose of such an order. However, it declined to provide the protective relief stating that "it is not

appropriate for us under the Natural Gas Act to include protective provisions requested by Exxon".

The Commission's failure to act resulted in the filing of a petition for review and request for stay by Southland in the Court of Appeals for the Fifth Circuit and a complaint, motion for injunction, and motion for temporary restraining order by Exxon in the United States District Court for the District of Columbia. As the result of these filings, which engaged the emergency attention of two Courts as well as of the parties and the Commission, itself, an interim arrangement was worked out under the aegis of the two Courts involved. This resulted in an order of the Court of Appeals for the Fifth Circuit which provides protective relief until the Court can act upon a request for stay or other protective relief, *pendite lite,* after a petition for review has been filed based upon a final order on rehearing in this proceeding.

We respectfully disagree with the Commission that it is "not appropriate" for it to provide protective relief *pendite lite.* We suggest that this case presents a significant instance where the administrative agency can, and should, assist the Court, the parties, and the public by adopting a protective order. If the Commission should adhere to its position on the merits of this case, its protective order could be substantially in the form of the Courts order of July 14, 1975, a copy of which is attached hereto, merely extending the term of the protective order until completion of judicial review. If, on rehearing, the Commission should reverse its position on the merits in Opinion No. 737, as we urge them to do, only a slight modification of

alternative (A) in Exxon's motion of July 2, 1975, would be required to reflect the change agreed to by the parties and adopted by the Court in its order of July 14, 1975.

Conclusion

Wherefore, for the foregoing reasons, in addition to the reasons heretofore presented in its brief in these proceedings, Exxon requests that, upon rehearing, the [509] Commission reverse its position stated in Opinion No. 737 and hold that the interests of Exxon and the other mineral fee owners were not dedicated by the sales by Gulf of gas produced from its leasehold interest and that no abandonment authorization under Section 7(b) is required. Exxon also requests that the Commission issue an appropriate protective order *pendite lite.*

Repectfully submitted,

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August 8, 1975.

[510] (AFFIDAVIT OMITTED IN PRINTING)

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(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

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[511] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

El Paso Natural Gas Company

Docket No. CI75-594

Texaco Inc.

(FILED AUGUST 11, 1975)

Application of El Paso Natural Gas Company for Rehearing

EL PASO NATURAL GAS COMPANY ("El Paso"), being aggrieved by the Commission's Opinion No. 737 issued July 11, 1975, in the above-styled and docketed proceeding, hereby respectfully applies for rehearing thereof, pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure.

I.

The Commission in its Opinion No. 737 issued on July 11, 1975, ordered that gas then being produced and sold in interstate commerce from two 50-year fixed term leases[1] must continue to be sold in interstate commerce after the expiration of said leases absent Section 7(b) abandonment authorization. In Opinion No. 737, the Commission also denied a motion of Exxon

[1] The lease in Docket No. CP75-209 covers property located in Crane County, Texas, and expired on July 14, 1975. The lease in Docket No. CI75-594 covers property in Ector County, Texas, and expired on August 7, 1975.

Corporation ("Exxon"),[2] supported by El Paso,[3] requesting the inclusion in the Commission's opinion of certain language intended to protect all parties pending ultimate judicial review.

II.

It remains El Paso's belief that the language proposed in its answer to Exxon's motion is necessary to protect all the parties pending [512] ultimate judicial review of the questions here involved. As Exxon explained in its motion for inclusion of protective order, the procedure of shutting-in the subject wells pending appeal of the Commission's order cannot be followed in this proceeding because the subject gas is casinghead gas which must continue to flow in order not to disrupt the oil production. Interim arrangements have been reached for the continued sale and delivery of the gas in question to El Paso pending judicial review of Opinion No. 737. If Opinion No. 737 is ultimately reversed, the mineral interest owners of the subject leases will demand that the gas which continued to flow to El Paso while the Commission's order was pending appeal must be repaid to them. The gas which El Paso receives under the interim arrangements is part of the supply relied upon by El Paso to serve its customers in interstate commerce. Any repayment of such gas in kind by El Paso to Exxon, Southland, and other mineral interest owners which could even-

[2] Motion of Exxon Corporation for Inclusion of Protective Order, Docket Nos. CP75-209 and CI75-594 (filed July 2, 1975).

[3] Answer of El Paso Natural Gas Company to Motion of Exxon Corporation for Inclusion of Protective Order, Docket Nos. CP75-209 and CI75-594 (filed July 10, 1975).

tuate from a court reversal of Opinion No. 737 would have to be accomplished with gas made available by the curtailment of El Paso's interstate customers. It is vital that no uncertainty exist regarding the procedures to be followed by El Paso should it ultimately be required to repay gas to Exxon, Southland, and the other mineral interest owners. The protective language urged by El Paso in its answer to Exxon's motion directly dealt with this matter. The Commission in Opinion No. 737 denied Exxon's motion for inclusion of such protective language and El Paso is therefore aggrieved by the Commission's Opinion No. 737, and submits that the Commission, upon rehearing of Opinion No. 737, should include in its order on rehearing such protective language. In particular, if the Commission modifies or reverses on rehearing Opinion No. 737, the following language should be included in the Commission's order:

> "If Southland Royalty Company ("Southland"), Exxon, and the other mineral interest owners should determine not to make sales of their production to El Paso and should El Paso or any other party decide to seek court review of this order, and if the Commission's determination herein should be reversed upon review and the gas be held to have been dedicated to El Paso, then Southland, Exxon, and the other mineral interest owners shall be required to repay to El Paso, subject to further Commission order, volumes of gas, in an equitable manner over a reasonable period of time, equal to those which should have been delivered to El Paso from the subject properties from the date the interest owners cease deliveries to El Paso until the date deliveries to El Paso are

> required to commence pursuant to final order no longer subject to review."

[513] If the Commission does not modify or reverse on rehearing Opinion No. 737, the following language should be included in any Commission order:

> "If Southland, Exxon, or other mineral interest owners should seek review of this order and upon review it should be ultimately determined that the gas may be sold to others than El Paso without abandonment authority, then any deliveries by Southland, Exxon, or the other mineral interest owners pending such judicial review shall not have constituted a dedication of their gas to the interstate market and acceptance of monies paid for gas delivered pending judicial review shall not prejudice the rights of the mineral interest owners' rights in the premises; further, El Paso shall be required to repay Southland, Exxon, and the other mineral interest owners in gas for the deliveries made to it pending judicial review. Such repayment is to be made by El Paso subject to the following conditions: (a) the pay-back volumes are to be delivered, in an equitable manner over a reasonable period of time, subject to further Commission order as to scheduling but not as to entitlement if El Paso, Southland, Exxon, and the other mineral interest owners cannot agree as to such scheduling, (b) Southland, Exxon, and the other mineral interest owners shall return to El Paso the monies paid for deliveries made pending judicial review, such repayments to be made within thirty (30) days following the end of each

calendar month during which payback volumes are delivered by El Paso, and (c) the pay-back volumes shall not be considered to be jurisdictional gas and acceptance thereof by Southland, Exxon, or the other mineral interest owners, or any of their customers, shall not subject any of them to Commission jurisdiction."

III.

The United States Court of Appeals for the Fifth Circuit entered on July 14, 1975, in *Southland Royalty Company* v. *Federal Power Commission,* No. 75-2851, an Order Providing Interim Protective Order incorporating the second part of El Paso's above proposed language. Inasmuch as the Court's order states that the "FPC has represented that it does not concede that the Court has jurisdiction to enter a protective [514] order," the Court's order does not contain the first part of El Paso's proposed language, and the Court's order is of limited duration, El Paso submits the Court's order does not foreclose the need for Commission action in providing protective language herein.

WHEREFORE, El Paso Natural Gas Company respectfully submits that rehearing of Opinion No. 737 should be granted and that, upon rehearing, said Opinion should be amended in the manner set forth herein.

Respectfully submitted,

EL PASO NATURAL GAS COMPANY

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(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

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[517] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

Application of Gulf Oil Corporation for Rehearing

GULF OIL CORPORATION (Gulf) pursuant to Section 19(a) of the Natural Gas Act (15 U.S.C. 717) and Section 1.34 of the Commission's Rules of Practice and Procedure applies for a rehearing of the Commission's Opinion No. 737 entitled "Declaratory Opinion and Order on Termination of Long-Term Leases" issued July 11, 1975 in the above Dockets. The grounds of this Application are:

THE COMMISSION ERRED IN HOLDING THAT GULF MAY NOT, WITHOUT PRIOR COMMISSION PERMISSION AND APPROVAL, REDUCE ITS SALES TO EL PASO NATURAL GAS COMPANY (El Paso) FROM THE WADDELL PLANT WHICH ARE ATTRIBUTABLE TO GAS OWNED BY THE REVERSIONARY MINERAL OWNERS, AFTER TERMINATION OF THE FIXED TERM LEASES ON JULY 14, 1975.

THE COMMISSION ERRED IN HOLDING THAT GULF MUST OBTAIN ABANDONMENT APPROVAL TO CEASE SALES FROM ITS GOLDSMITH LEASE TO PHILLIPS PETROLEUM COMPANY (Phillips) AFTER TERMINATION OF THAT LEASE ON AUGUST 7, 1975.

In its opinion the Commission makes the surprising statement that it has "discovered no case directly in point." (p. 5, Op. 737) It would be difficult to find one case more apropos to another than the facts, rationale and decision in the *Bass* case[1] are to this proceeding. [518] The Commission's distinctions of the *Bass* case are specious at best. The Commission should either follow it or overrule it. Furthermore, as we shall show, the principles of *Bass* as enumerated by the Commission, are inescapable in their application here. The mere transposition of names in the Commission's language in *Bass* serves to demonstrate the point:

> "The thrust of El Paso's argument is that El Paso in some manner acquired a right to purchase that which Shell (Gulf) had *no right to sell*. We will not so alter the basic property rights of mineral owners through the fiction of Section 7(b) application." (p. 9, Op. 638)[2]

It goes without saying that Gulf had no right to sell the gas which reverted to the mineral owners on July 14, 1975. As a matter of fact Shell did have the power, *before the farmout,* to authorize Bass to commit the entire lease, even though it did not do so. Gulf never even had this power. The Commission in *Bass* continued:

> "El Paso is charged with *notice of the limitations* on Shell's power to contract, for such limitations preceded the Shell-El Paso agreement by seven years and were express in the very instru-

[1] *El Paso v. Bass, Opinion* No. 638, 48 FPC 1269 (1972).

[2] All emphasis in the brief is added.

ment which marked Shell's inception of title, the 1956 farmout agreement. We note that the Shell-El Paso gas contract did not purport to cover any gas save that produced from 'the properties owned by Shell.' In law, Shell contemplated selling, and El Paso contemplated buying, Shell's gas." (p. 9, Op. 638)

El Paso knew, or should have known, of the limitations in Gulf's lease since it was of record. Furthermore, Gulf's sale to El Paso was specifically limited to the residue gas Gulf owned and had available for sale from the Waddell Plant, which after July 14, 1975, did not include the reversionary mineral owners' gas. Obviously, in law, Gulf contemplated selling and El Paso contemplated buying only the gas Gulf had for sale at the Waddell Plant, not gas of other parties in which Gulf has no interest.

The Commission's attempts to distinguish the *Bass* case are spurious. The Commission first said:

> "The *Bass* case, which did not involve the diversion of gas from interstate commerce, likewise does not alter our result." (p. 7, Op. 737)

[519] This sentence leaves for the imagination whether the Commission intended the reference to the diversion of gas from interstate commerce as a legal distinction, or merely a commentary. If the former was intended, it is clearly invalid. The necessity for compliance with the requirements of Section 7(b) is unrelated to whether the proposed new sale is in inter- or intra-state commerce. If the Section is applicable at all, it applies as the Commission many times has

held, to any change from one buyer to another. In fact, in *Warren Petroleum Corporation* v. *Sun Oil Company*[1] the Commission held that Section 7(b) applied to a new sale by a producer, even though the gas was ultimately delivered to the same pipeline company previously purchasing the same gas from the processor.

In the next sentence the Commission's second so-called distinction is:

> "There [the *Bass* case] the lessee, Shell, by means of its contract with El Paso, plainly intended to provide a service based upon the dedication of its interest in the leasehold, not the interest of Bass, who had the right to receive a ½ working interest in lieu of his royalty." (p. 7, Op. 737)

To be a distinction, the Commission must have assumed that Gulf intended to provide a service to El Paso based on the dedication not only of its interest, but also of the interests of the reversionary mineral owners after the termination of the lease. Nothing in Gulf's contracts with El Paso or Phillips would support any such assumption. As pointed out above, Gulf contracted to sell to El Paso *only* the residue gas it had available for sale, which could not include mineral owner gas it did not own. The term provision of Gulf's contract with Phillips specifically provided that the contract terminated with the termination of the leases, so the contract did not contemplate a sale of a greater interest than Gulf owned.

Furthermore, if Gulf had attempted to dedicate to El Paso a greater interest than it owned, such a dedi-

[1] RI71-970; CI-788; and CI72-156. Order dated October 25, 1972, affirming Examiner's Decision dated June 21, 1972.

cation would have been a nullity. The Commission recognized this lack of authority in *Bass* when it stated:

> "*Neither party* can be heard to say that the gas contract can function to impair the pre-existing title of Bass, [520] who was not a party to the gas contract and who could not have prevented its execution." (p. 9, Op. 638)

If El Paso could not be heard to say that its gas contract with Shell could not impair the pre-existing title of Bass, how can the Commission here say that Gulf's contract can impair the pre-existing title of the mineral owners? Bass' interest in the lease came into being through the passage of time and the recoupment by Shell of its expenditures. The title of the reversionary mineral owners in this case came into being solely through the passage of time. The Commission's next sentence in *Bass* is so obviously right in principle, and clearly applicable here as to be controlling in this case:

> "El Paso's rights to purchase gas from the James Ranch Well *can rise no higher than Shell's rights to sell that gas*, yet El Paso seeks that result by its claim that it is entitled to purchase Bass' gas until this Commission orders otherwise." (p. 9, Op. 638)

If El Paso's rights to purchase the James Ranch Well can rise no higher than Shell's right to sell, how can El Paso's right to purchase the gas from the Waddell Ranch lease rise higher than Gulf's right to sell that gas? The principles which the Commission found so clearly applicable in *Bass* it now ignores, or avoids

by spurious distinctions. The last attempted distinction is an illustration:

> "The interstate dedication [in *Bass*] thus covered only part of the leasehold, while here the leaseholds were wholly dedicated to interstate commerce." (p. 7, Op. 737)

This is perhaps the most unworthy distinction of all. In effect, it says that a dedication by the owner of a part of a leasehold is necessarily limited to the interest which it owns, while the dedication of a leasehold owned in its entirety extends beyond the lease to interests not owned by the leaseholder. The legal principle which precludes a dedicator from dedicating beyond his ownership is as applicable to interests coming into existence after the termination of a lease as it is to interests coming into existence during the term of the lease as in *Bass*. The difference is no legal distinction.

The last comment on *Bass* is no distinction at all, but merely semi-concession of the relevancy of the *Bass* case. The Commission said:

> "In any case, we believe that the *broad language* used in *Bass* should be confined to the facts of the case and *not extended to the difficult situation here involved.*" (p. 7, Op. 737)

[521] No explanation is made of what "broad language" in the *Bass* case the Commission considered should be "confined to the facts of the case." The fact is that the principles in *Bass* are so obviously applicable here, and are stated so clearly in that opinion that the Commission is forced to resort to spurious distinc-

tions and broad unexplained generalizations to avoid reaching the same result.

Nor does the Commission give any explanation as to what it considered to be the "difficult situation here involved" that caused it to ignore *Bass*. The situation may be difficult for El Paso, but the facts are so uncomplicated they were agreed to by all the parties. We suspect that the real difficulty here is that the reversionary mineral interest owners have sold their gas in the intrastate market. This may be a regrettable illustration of the incapability of interstate pipelines to compete for gas with intrastate buyers because of restraints imposed by the Commission's rate orders, but it has no relevance to any legal issue in this proceeding. The Commission cannot rewrite the statute to conform to its concept of the authority it believes it should, but does not, have.

As recently as May 14, 1975,[4] the Commission reaffirmed the basic principles of *Bass* in language which, applied here, demonstrates the Commission's error in this proceeding. In *Blair-Vreeland* the Commission said:

> "'. . . In Bass *the question was not what Bass could bestow on Shell,* but *what Bass in fact did bestow* [on Shell] by way of a farmout agreement.'" (p. 4, Op. 724-A)

The reversionary mineral interest owners here *could have, but did not,* bestow on Gulf the right to commit their interests after termination of the leases. In affirming the principles of *Bass* on May 14, 1975, that a

[4] *Blair-Vreland,* CI74-331, Opinion No. 724-A.

gas seller may not dedicate beyond his ownership the Commission showed no indication that it believed that the "broad language" of *Bass* should be confined to its facts. In any event, as we have pointed out, the facts here are so similar to those in *Bass* that no valid distinction can be made. The Commission must either overrule *Bass* and the principles on which it is grounded, or modify its decision here to recognize the inapplicability of the abandonment provisions of the Act.

One further comment is necessary. With regard to Gulf's sale of the surplus residue gas from the Waddell Plant, the Commission states:

> "In our opinion the Commission did not intend [in Sec. [522] 154.91(e) of the Regulations] to exempt plant operators from the requirement that they apply under Section 7(b) for abandonment of their sale *to the extent that the sale has been reduced by a substantial and permanent loss of supply.* Therefore the two plant operators Gulf (Warren) and Phillips should make applications under Section 7(b) if they lose termination of the 50-year leases."

Gulf does not contend that Section 7(b) does not apply to its sales of surplus residue gas from the Waddell Plant. It does contend, however, that it has not abandoned any part of its sale or service obligation under the contract simply because it no longer owns a portion of the gas which it previously owned under the Waddell leases. Gulf's contract with El Paso, certified by the Commission, did not dedicate any particular lease. It was limited to "surplus residue gas avail-

able for sale" from the Waddell Plant. Obviously gas which Gulf never owned cannot fall within that category.

Conclusion

It is submitted that the Commission erred in holding that Gulf was required to secure abandonment approval for discontinuing deliveries of gas which reverted to the mineral owners after termination of the Waddell Leases on July 14, 1975 and the Goldsmith Lease on August 7, 1975.

Respectfully submitted,

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Attorneys for Gulf Oil Corporation

Dated: August 8, 1975

[523] (Verification Omitted in Printing)

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(Certificate of Service Omitted in Printing)

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[524] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket Nos. CP75-209
and CI75-594

El Paso Natural Gas Co.
and Texaco, Inc.

(Received August 13, 1975)

Application of Mobil Oil Corporation, Intervenor, for Rehearing of Opinion No. 737

Mobil Oil Corporation (Mobil), Intervenor in the above captioned proceedings, pursuant to Section 19(a) of the Natural Gas Act (Act)[1] and Section 1.34 of the Federal Power Commission's (Commission) Rules of Practice and Procedure hereby files its Application for Rehearing of Opinion No. 737 issued by the Commission at Docket Nos. CP75-209 and CI75-594 on July 11, 1975, and in support thereof shows:

I.

Specification of Errors

A. The Commission has erred in finding that reversionary Mineral Interest Owners are subject to the Commission's jurisdiction under the Act.

B. The Commission has erred in finding that reversionary Mineral Interest Owners must file an application for abandonment pursuant to Section

[1] 15 USC § 717.

7(b) of the Act with respect to sales of gas made by a previous Lessee.

C. The Commission has erred in finding that gas sold in interstate commerce by a Lessee, under a limited-term lease prior to its expiration, committed all gas reserves underlying the said lease to interstate commerce for an indefinite term.

D. The Commission's order is unlawful in that it deprives the reversionary Mineral Interest Owners of their property without due process of law in violation of the Constitution of the U. S.

[525] II.

ARGUMENTS IN SUPPORT OF SPECIFIED ERRORS

A. The Commission has erred in finding that reversionary Mineral Interest Owners are subject to the Commission's jurisdiction under the Act.

It has been well established that the Commission's jurisdiction under the Act does not attach to a sale of gas in interstate commerce until that sale is commenced. Mobil, as one of the reversionary Mineral Interest Owners, has never made a sale of its share of gas reserves from any of the leases described in the contract between Gulf Oil Corporation (Gulf) and El Paso Natural Gas Company (El Paso) which was the subject of this proceeding.

Prior to obtaining its reversionary mineral interest in such gas reserves at the expiration of Gulf's 50-year fixed-term lease agreement, Mobil was at all times a royalty interest owner as to the sale of gas which was made by Gulf to El Paso. Despite the ef-

forts, previously to extend its jurisdiction to royalty owners, and in this case to reversionary mineral interest owners, in the name of "public interest" the court has held in *Mobil Oil Corporation* v. *FPC,* 482 F.2d 256 (D. C. Cir., 1972), that Congress did not give the Commission such authority under the Act. Therefore, the Commission has erred in finding that Mobil, as a reversionary mineral interest owner, in the said gas reserves, is subject to the Commission's jurisdiction under the Act and amenable to such regulations in respect of Mobil's sale of gas from such remaining reserves.

In further support of this argument, Mobil hereby adopts and incorporates by reference the arguments of Section II of Exxon's Initial Brief in this proceeding dated June 25, 1975, and Section II(B) of the Initial Brief of Mineral Interest Owners dated June 20, 1975.

B. The Commission has erred in finding that reversionary Mineral Interest Owners must file an application for abandonment pursuant to Section 7(b) of the Act with respect to sales of gas made by a previous Lessee.

Section 7(b) of the Act provides that:

"No natural gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission or any service rendered by means of such facilities without the permission [526] and approval of the Commission first had and obtained, and after due hearing, and a finding by the Commission that the available

supply of natural gas is depleted to the extent that continuation of service is unwarranted or that the present or future public convenience or necessity permits such abandonment."

Section 2(6) defines "Natural Gas Company" as

". . . a person engaged in the transportation of natural gas in interstate commerce, or sale in interstate commerce of such gas for resale."

Since Mobil has never made a sale of gas from the reserves attributable to its reversionary mineral interest, then Mobil is not a natural gas company within the meaning of the Act and is not required by Section 7(b) of the Act to file an abandonment as therein provided.

In further support of this argument, Mobil hereby adopts and incorporates by reference, the arguments contained in Section II(B) of the Initial Brief of Mineral Interest Owners filed June 20, 1975; the arguments of Section (A) of the Reply Brief of Mineral Interest filed June 24, 1975, and Section II of the Reply Brief of Exxon Corporation filed June 25, 1975.

C. The Commission has erred in finding that gas sold in interstate commerce by a Lessee, under a limited-term lease prior to its expiration, committed all gas reserves underlying the said lease to interstate commerce for an indefinite term.

The Commission's holding in *El Paso Natural Gas Company* v. *Perry R. Bass*, 48 FPC 1269 (1962), that the delivery of gas by the lessee in interstate com-

merce does not impair the rights of the mineral owner to market its gas is clearly applicable to the facts in this case, and the Commission's arbitrary refusal to follow its prior holding in *Bass* in deciding this case is discriminatory and unlawful.

If Shell's dedication of gas to El Paso in the *Bass* case did not dedicate the gas to which Bass had a right to El Paso, as a result of Bass converting a royalty interest to a working interest, then *a fortori* the gas reserves which Mobil owns as a reversionary mineral interest owner were not dedicated to El Paso by Gulf under the lease in which is now expired. Gulf unequivocably stated that it did not purport [527] to dedicate gas to El Paso which it would not own after the expiration of the lease; and that had it attempted to do so, such dedication would have been ineffective as a matter of law. This statement should have been dispositive of this entire matter, and it is clearly error for the Commission to have held otherwise.

In further support of its argument hereof, Mobil hereby adopts and incorporates by reference the Initial Brief of Gulf Oil Corporation dated June 18, 1975, Section III(B), (pages 8-10), of the Initial Brief of Exxon Corporation, dated June 20, 1975, Sections A and B of the Reply Brief of Mineral Interest Owners dated June 24, 1975.

D. The Commission's order is unlawful in that it deprives the reversionary Mineral Interest owners of their property without due process of law in violation of the Constitution of the U. S.

The Commission is in error when it states that the reversioners are not denied of their property without

due process of law. While it is true that the reversioners will be compensated for any continued interstate sales under the Natural Gas Act, the Commission overlooks the fact that by such action, it is forcing the producers to sell gas in interstate commerce at confiscatory rates.

The Supreme Court of the United States has spoken on the matter of confiscation of property by forcing the sale of such property at confiscatory rates in *Smith* v. *Illinois Bell Telephone Company,* 270 US 587, 45 Sup.Ct., ——, —— L.Ed 47, (1926). Absent the Commission's Opinion No. 737, the reversionary Mineral Interest Owners could sell their gas in the intrastate markets at prices based on true-market value; whereas, now they are forced to continue the sale of gas in interstate commerce at regulated rates which are confiscatory and less than the just and reasonable rate for such gas based on the true-market value.

The Commission currently has before it national gas rate proceedings in which consideration will be given to raising the regulated rates to true-market value; however, at this time, the Commission's decision in these proceedings is being delayed by emphasis on other regulatory maters involving gas reserves and responding to congressional inquiries regarding the Commission's regulation of natural gas. Thus, the Commission's action in Opinion No. 737, which forces the sale of the reversioners' gas in interstate commerce while at the same time the Commission continues and [528] unreasonably delays putting an end to confiscatory rates, constitutes a deprivation of property without due process of law which the Su-

preme Court referred to in *Smith* v. *Illinois Bell Telephone Company, supra,* and is in violation of the Constitution of the United States.

WHEREFORE, Mobile Oil Corporation for the reasons hereinbefore set forth respectfully requests the Commission to grant rehearing of its Opinion No. 737 and upon such rehearing, to rescind the ordering provisions of such opinion, and grant such further relief as may be appropriate.

Respectfully submitted,

MOBIL OIL CORPORATION

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Houston, Texas
August 11, 1975

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[531] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION No. 737-A

Docket No. CP75-209

El Paso Natural Gas Company

Docket No. CI75-594

Texaco Inc.

(ISSUED: SEPTEMBER 3, 1975)

Opinion and Order Denying Rehearing but Adopting Per Curiam

DC-51

[532] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; William L. Springer and Don S. Smith.

Docket No. CP75-209

El Paso Natural Gas Company

Docket No. CI75-594

Texaco Inc.

OPINION No. 737-A

(ISSUED SEPTEMBER 3, 1975)

Opinion and Order Denying Rehearing but Adopting Per Curiam

Texaco Inc. on August 4, 1975, a group of Mineral Interest owners and Exxon Corporation on August 8, 1975, Gulf Oil Corporation (Gulf) and El Paso Natural Gas Company, on August 11, 1975, and Mobile Oil Corporation on August 13, 1975, have filed applications for rehearing of the Commission's Opinion No. 737 and order issued July 18, 1975, in the above-entitled proceedings. In Opinion No. 737 the Commission determined that the various mineral interest owners holding reversionary interests in 50-year leases covering certain gas reserves in Crane County and Ector County, Texas were subject to the dedications made by the leaseholders, Gulf and others,[1] for the

[1] As here used Gulf includes the other leaseholders and predecessors.

sale of the gas in interstate commerce to El Paso Natural Gas Company and that, upon termination of the leases, they might not sell gas in intrastate commerce without obtaining abandonment approval under Section 7(b) of the Natural Gas Act. The Commission also determined that Gulf need not obtain permission to cease sales to Warren Petroleum Company, now a

[533] Docket No. CP75-209
CI75-594

division of Gulf, but that other leasees must do so, and that Gulf must do so with respect to its sales to Phillips Petroleum Company for resale to El Paso. Further, Gulf, formerly Warren, and Phillips may not reduce their sales to El Paso to the extent such sales are attributable to production from the subject property without prior Commission permission.

The applications for rehearing largely involve restatements and amplification of the arguments already made and covered in Opinion No. 737. The mineral interest owners contend that the only service dedicated to interstate commerce was the service of delivering all of the gas attributable to the fixed-term leasehols estates. Just as half of the gas from a well may be dedicated to interstate commerce and half to intrastate commerce here, they say, only the leasehold interests were dedicated to interstate commerce. In our opinion there is a difference. Predecessors of Gulf commenced the service of delivering gas from the reserves here involved to interstate commerce. Gulf could have at the same time commenced delivering part of the gas here involved to intrastate buyers, and we would recognize such an intrastate dedication. Here, however, we are solely concerned with the

service commenced by Gulf to El Paso in interstate commerce. Under Section 7(b) of the Natural Gas Act this service may not be abandoned without the permission of the Commission. Nor, as we said in Opinion No. 737, can this service be discontinued by transfer to a successor interest. For the practical purposes of the Act it makes no difference whether the successors happen to be assignees, purchasers or reversionary interests. While the contractual right to control and sell the reserves here involved has passed from Gulf to the various mineral interests, this does not mean that under the Natural Gas Act the gas flowing in interstate commerce may be diverted to the intrastate market. As said in *Huber Corp.* v. *F.P.C.*, 236 F.2d 550, 558 (CA3 1956), Congressional power to regulate interstate commerce in natural gas includes authority to regulate abandonment of sales.

Several of the applicants for rehearing argue, as they have previously, that *El Paso* v. *Bass*, 43 FPC 1969, Opinion No. 638 (1972) is contrary to our position here. There Bass entered into a farmout agreement with Shell to develop a producing area retaining a 146 overriding royalty with an option to convert it to a ½ working interest. Shell later entered into an agreement to sell gas to El Paso from "seller's interest in wells". Still later Bass exercised his option to convert to a working interest and proposed to sell his share of the gas to another pipeline. The Commission held that Bass might do so without obtaining abandonment authorization.

[534]

The chief differences between the *Bass* situation and the present one is that the Shell sale agreement

pointedly made it clear that Shell was only selling gas from its interest in the properties involved while in the present case Gulf had a long leasehold interest and sold surplus residue gas available from its leasehold properties. To the extent, however, that *Bass* can be said to stand for the proposition that the service initiated by the leaseholder based upon certain gas reserves covered by the lease can be terminated without Commission approval, it is overruled. It should be noted that Bass did not involve the shift of gas reserves from interstate to intrastate commerce and did not involve the public interest in the encouragement of farmouts, and these circumstances, in part, explain the result in *Bass*.

The Mineral Interest Owners, Exxon and Texaco argue variously that we have violated the property law of Texas, the Tenth Amendment to the United States Constitution reserving to the states powers not granted to the Federal Government, and the Fifth Amendment by depriving them of property without due process of law. The essence of the argument appears to be that we are in error in holding that the leaseholders, Gulf *et al.*, had power to encumber the property with the result that the mineral lease owners are forced to enter into an interstate sale against their will. We assume that in 1925, when the leases were made the lease owners did not contemplate that the Natural Gas Act would be enacted with a provision that service might not be abandoned without approval of the Commission. They clearly did contemplate that the leaseholders would drill for oil and gas and sell oil and gas to outside parties, and there was no reason that these sales could not be in interstate com-

merce, and may have had a duty to do so under the facts and law at that time. After the Natural Gas Act was enacted in 1938 and the *Phillips* case[2] was decided in 1954 the interstate sales of gas became subject to FPC jurisdiction. The leaseholders who had a duty to exploit the wells were the appropriate parties to seek FPC certification. Upon the commencement of interstate sales under FPC certification, the sales became imbued with the public interest.[3] The law of Texas preserved for the lease owners [535] their property interest, and we do not change this, but Section 7(b) of the Act will not permit abandonment of interstate sales without our authority once such sales have commenced. The mineral lease owners who entered into a lease that permitted the leaseholders to make interstate sales are not deprived of this property by being required to permit such sales to continue, and they will be compensated under the just and reasonable rates promulgated under the Natural Gas Act.

These considerations, in our opinion, answer the argument of Exxon that it is being forced to make a sale at the termination of Gulf's leasehold interest and that this constitutes an unlawful taking under the Fifth Amendment. The sale of gas was already

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[2] *Phillips Petroleum* v. *Wisconsin*, 347 U.S. 672 (1954).

[3] The lease owners could have intervened in the proceedings granting certificates to Gulf and Phillips Petroleum Co. to sell the gas to El Paso but our records do not reveal that they have done so. See orders dated May 28, 1956, in Docket No. G-7156, September 28, 1956, in Docket No. G-2625, 16 FPC 1440, and February 24, 1958, in Docket No. G13445, 19 FPC 1151. However, the lease owners apparently had no objection to interstate dedication, for they accepted royalties from sales.

being made from the properties here involved before the advent of regulation. Exxon or its predecessors had leased the properties for this purpose. The imposition of regulation did not constitute an unlawful taking. *Nebbia* v. *New York,* 291 U.S. 502 (1939); *F.P.C.* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 582 (1942). A producer contracting to sell gas in interstate commerce before regulation commences is properly subject to Section 7(b) although he may never have contemplated such a result. See *Harper Oil Co.* v. *F.P.C.,* 284 F.2d 137 (CA10 1960). Here Exxon is not being forced to make an initial sale but is required to conform to the Natural Gas Act when it succeeds to the interest of Gulf.

The Mineral Interest Owners, Exxon and El Paso argue that the Commission should provide protective relief, *pendente lite.* In Opinion No. 737 we discussed a proposal by Exxon that if we required abandonment authorization for the mineral interest owners, as we had, and if it were determined on judicial review that the gas might be sold to others than El Paso without abandonment authority, then any deliveries by the mineral interest owners should not constitute a dedication of their gas to the interstate market, acceptance of monies should not prejudice their right to a different rate, and El Paso should be required to repay them in gas for deliveries made to it during judicial review. However, we determined that it was not for us to include the protective provisions and that the parties should address themselves to the appropriate court.

Since Opinion No. 737, the Mineral Interest Owners on July 14, 1975, obtained a temporary stay of the

Commission's order in the United States Court of Appeals for the Fifth Circuit. As of the same date upon the consent of Southland [536] Royalty Company, et al., Exxon, El Paso and the Commission, the Court issued an Interim Protective Order containing language corresponding to Exxon's proposal set forth here in ordering clause (B). The Court's order provided that it should be effective until a petition for review of the final Commission order on rehearing of Opinion No. 737 is filed in a court of appeals and any concurrently filed motion for stay or protective order is decided by the court of appeals and further judicial review is exhausted. The Court's order noted that the FPC represented that it did not concede that the Court had jurisdiction to enter a protective order in this matter, but in order to settle a controversy inasmuch as the Court had determined to act, the F.P.C. had represented that it believed that the foregoing provisions were the most equitable matter of preserving the status quo, and it would not move to vacate this order.

On August 4, 1975, Southland Royalty Company and El Paso entered into a letter agreement providing protective provisions and other terms for the continued delivery of gas to El Paso. The Mineral Interest Owners explain that due to the large number of people and distances involved the mineral interest owners, other than Southland, have not yet executed a formal document, but have agreed to it in principle.

More specifically, the letter agreement provides that where Southland is compelled to deliver gas to El Paso by Opinion No. 737 or any other order of the Commission or the courts the initial rate shall con-

sist of the higher of 76.5 cents per Mcf plus certain adjustments, 150% of the national rate, or any higher rate that El Paso is permitted to pay. If El Paso is prevented from including this cost of gas in its rates, Southland is to refund to El Paso the amount disallowed. In the event Southland prevails upon rehearing of Opinion No. 737 and delivers gas elsewhere and later it is determined that Southland should have continued to make deliveries to El Paso, there are requirements for the payback of volumes of gas to El Paso. In the event that the Commission's determination in Opinion No. 737 is reversed, and it is determined that the gas could have been sold to others than El Paso, there are requirements for the payback of gas by El Paso to Southland similar to those in the Court order discussed above.

[537]

El Paso and Southland also agree to request the Commission to include protective payback provisions in its order in accordance with the letter agreement and that these protective provisions shall be the sole measure of damages and liability as between El Paso and Southland. Attached to the letter agreement are general terms and conditions for the delivery of gas by Southland and payment thereafter by El Paso.

In our opinion the letter agrement misconceives the legal situation of the parties. Deliveries to El Paso must continue to be made by Gulf and Phillips as before the termination of the leases until new rate filings are made in accordance with the Commission's Regulations substituting Southland, Exxon and other parties for those originally serving El Paso, unless permission is obtained from the Commission to aban-

don the service to El Paso. We observe further that until appropriate rate filings are made by Southland and other mineral interest owners we cannot resolve the issues raised by the agreement of August 4, 1975. Because of the Court order, however, putting in effect protective language to cover the situation where gas deliveries to El Paso continue, we think it appropriate to adopt this same language, as El Paso requests in its application for rehearing, to cover the period until our order becomes final.

The Commission further finds:

(1) The assignments of error and grounds for rehearing set forth in the application for rehearing filed by Texaco, the Mineral Interest Owners, Exxon, Mobil and Gulf in these proceedings present no facts or legal principles that would warrant any change in or modification of the Commission's Opinion No. 737 and the accompanying order except as provided below.

(2) It is necessary and appropriate in the administration of the Natural Gas Act that the application for rehearing filed by El Paso be granted and that the protective language below be adopted to cover the period until our order becomes final.

The Commission orders:

(A) The applications for rehearing filed by Texaco, the Mineral Interest Owners, Exxon, Mobil, and Gulf are denied; the application for rehearing, filed by El Paso is granted.

[538]

(B) If Southland, Exxon, or any other mineral interest owners should seek review of this order and

upon review it should be ultimately determined that the gas may be sold to others than El Paso without abandonment authority, then any deliveries by Southland, Exxon, or the other mineral interest owners pending such judicial review shall not have constituted a dedication of their gas to the interstate market and acceptance of monies paid for gas delivered pending judicial review shall not prejudice the rights of the mineral interest owners' rights in the premises; further, El Paso shall be required to repay Southland, Exxon, and the other mineral interest owners in gas for the deliveries made to it pending judicial review. Such repayment is to be made by El Paso subject to the following conditions: (a) the pay-back volumes are to be delivered, in an equitable manner over a reasonable period of time, subject to further Commission order as to scheduling but not as to entitlement if El Paso, Southland, Exxon, and the other mineral interest owners cannot agree as to such scheduling, (b) Southland, Exxon, and the other mineral interest owners shall return to El Paso the monies paid for deliveries made pending judicial review, such repayments to be made within thirty (30) days following the end of each calendar month during which pay-back volumes are delivered by El Paso, and (c) the pay-back volumes shall not be considered to be jurisdictional gas and acceptance thereof by Southland, Exxon, or the other mineral owners, or any of their customers, shall not subject any of them to Commission jurisdiction.

By the Commission,
(SEAL)

KENNETH F. PLUMB,
Secretary.

[613]

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

Docket No. CP75-209

El Paso Natural Gas Company

Docket No. CI75-594

Texaco, Inc.

(RECEIVED OCTOBER 6, 1975)

Application of Mineral Interest Owners for Rehearing of Limited Aspects of Opinion No. 737-A

COME NOW Mineral Interest Owners[1] and, pursuant to Section 1.34 of the Commission's Rules of Practice and Procedure and Section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a), file this Application for Rehearing of Opinion No. 737-A subject to the limitations and reservations hereinafter described.

SPECIFICATION OF ERROR

1. The Commission erred in holding that "deliveries to El Paso must continue to be made by Gulf and Phillips as before the termination of the leases until new rate filings are made in accordance with the Commission's Regulations substituting Southland, Exxon, and other parties for those originally serving El Paso, unless permission is obtained from the Commission to abandon service to El Paso." (memo. p. 6).

[1] Mineral Interest Owners on whose behalf this document is filed were listed on Exhibit A attached to the Mineral Interest Owners' "Initial Brief" in this proceeding.

2. The Commission erred in holding that unidentified issues were raised by the agreement of August 4, 1975 between El Paso and Southland and that such issues cannot be resolved until appropriate rate filings are made.

[614] LIMITATIONS AND RESERVATIONS

In its Opinion No. 737-A, the Federal Power Commission denied the Applications for Rehearing of Opinion 737 filed by Mineral Interest Owners, Texaco, Exxon, Mobil and Gulf. At the same time, the Commission provided for the inclusion in its orders of certain protective language which had been requested by the parties. Mineral Interest Owners continue to believe the Commission erred on Opinion Nos. 672 and 672-A for each and all of the reasons set forth in its Application for Rehearing filed on August 8, 1975. In this regard, Mineral Interest Owners filed on September 5, 1975, a Petition for Review of Opinions 737 and 737-A which has ben assigned No. 75-3373 in the United States Court of Appeals for the Fifth Circuit.[2]

This Application for Rehearing is limited to matters raised for the first time in the Commission's Order on Rehearing in Opinion 737-A and to which Mineral Interest Owners have not previously had an opportunity to respond.[3] By so limiting this Application for

[2] Mineral Interest Owners also filed an interlocutory appeal with the Fifth Circuit on July 13, 1975 in Docket No. 75-2851.

[3] Mineral Interest Owners are well aware that there is no provision in the Natural Gas Act or in the Commission's Rules and Regulations authorizing an application for rehearing of an order denying rehearing. However, the matters complained of herein involved action taken by the Commission for the first time in Opinion 737-A.

Rehearing, Mineral Interest Owners do not in any way concede the correctness of the Commission's decisions in Opinion Nos. 737 and 737-A and expressly state that such opinions are in error for each and all of the reasons set forth in the Mineral Interest Owners' Application for Rehearing filed on August 8, 1975. Accordingly, this application for rehearing is submitted without prejudice to and with full reservation of the rights of Mineral Interest Owners in connection with the petitions to review Opinion Nos. 737 and 737-A pending in the United States Court of Appeals for the Fifth Circuit.

[615] ARGUMENT

A. *Certain Language in Opinion 737-A is Ambiguous and Should be Clarified.*

In their Application for Rehearing of Opinion 737, several of the parties to this proceeding requested the Commission to include appropriate protective provisions in its Order on Rehearing. On page 4 of Opinion 737-A, the Commission began a discussion of the various parties' requests for the inclusion of such protective provisions. The Commission took note that Southland Royalty Company and El Paso had on August 4, 1975, entered into a letter agreement providing for protective provisions and other terms for the delivery of gas to El Paso under compulsion of the Commission's orders in Opinion 737.[4] Mineral Interest

[4] Mineral Interest Owners stated in footnote 58 of its Application for Rehearing that at that time only Southland Royalty Company and El Paso had executed an interim agreement but that it was anticipated that agreements between the remaining Mineral Interest Owners and El Paso would be executed shortly. The re-

Owners appended a copy of the August 4, 1975 letter agreement to their Application for Rehearing and requested that the protective provisions contained therein be adopted by the Commission in its Order on Rehearing.

Following its description of the August 4, 1975 letter agreement, the Commission made the following statement on page 6 of Opinion 737-A:

> In our opinion the letter agreement misconceives the legal situation of the parties. Deliveries to El Paso must continue to be made by Gulf and Phillips as before the termination of the leases until new rate filings are made in accordance with the Commission's regulations substituting Southland, Exxon and other parties for those originally serving El Paso, unless permission is obtained from the Commission to abandon the service to El Paso. We [616] observe further that until appropriate rate filings are made by Southland and other Mineral Interest Owners, we cannot resolve the issues raised by the agreement of August 4, 1975. Because of the court order, however, putting into effect protective language to cover the situation where gas deliveries to El Paso continue, we think it appropriate to adopt this same language, as El Paso requests in its Application for Rehearing to cover the period until our order becomes final.

Mineral Interest Owners are, quite frankly, confused by this paragraph. The second and third sen-

maining Mineral Interest Owners have now executed agreements with El Paso which are in all material respects identical to the August 4, 1975 agreement between Southland and El Paso.

tences of this paragraph seem to state that some sort of rate filing must be made by Mineral Interest Owners in order for Mineral Interest Owners to be paid by El Paso pursuant to the letter agreement. The final sentence in the above-described paragraph, however, seems to negate the conclusions reached in the preceding two sentences when it states that it will adopt protective language proposed by El Paso. Subsequently in Ordering Paragraph (A), the Commission granted El Paso's application for rehearing. In summary, the paragraph seems to say that, although the Commission believes that Mineral Interest Owners would ordinarily be required to make some sort of rate filing, because of existence of the Fifth Circuit's, and now the Commission's, protective order no such rate filings are required.

As small producers under the Commission's Regulations,[5] Mineral Interest Owners do not believe that any rate filings under any circumstances are necessary in order for them to receive payment pursuant to the interim agreements with El Paso.[6] Due to the uncer-

[5] Mineral Interest Owners were issued permanent or temporary small certificates in the following dockets:

Southland Royalty Co.	CS66-114 (permanent)
Trustee under the Estate of Warren Wright, deceased	CS76-33 (temporary)
William Y. Penn *et al.*	CS76-34 (temporary)

[6] El Paso evidently concurred in this viewpoint as evidenced by El Paso's payment to Mineral Interest Owners of all amounts due under the interim agreement of August 4, 1975 for gas delivered between July 14 and July 31, 1975. However, since the issuance of Opinion 737-A, El Paso has suspended all payments for gas delivered by Mineral Interest Owners subsequent to July 31, 1975 under the compulsion of Opinion 737 and the penalties prescribed by the Natural Gas Act.

tainty in the Commission's language, [617] however, Mineral Interest Owners cannot determine whether the Commission intended to require them to make rate filings now or at any time in the future.[7] Mineral Interest Owners believe, therefore, that the above-quoted paragraph from Opinion 737-A should be clarified.

B. *Mineral Interest Owners Are Not Required To Make Rate Filings In Order To Be Paid Pursuant To Their Interim Agreements*

Mineral Interest Owners strongly object to any holding or implication that they are required to make any rate filings with respect to their deliveries to El Paso. Mineral Interest Owners are all small producers as that term is defined in Section 157.40 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 157.40. The Commission has made it clear that small producers are not required to make rate filings. *See* Regulations under the Natural Gas Act, § 157.39, 18. C.F.R. § 157.40.[8]

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[7] The confusion of Mineral Interest Owners also stems from the fact that in Opinion 737-A the Commission granted El Paso's application for rehearing. As noted in footnote 5 *supra*, prior to the issuance of 737-A El Paso had concurred in the position that it was not necessary for Mineral Interest Owners to make any filings with the Commission in order to collect the price specified in the interim agreement dated August 4, 1975.

[8] It is specifically provided under Section 1.39 that the regulations requiring independent producers to make rate filings shall not be applicable to small producers. In the words of this provision:

Applicability of Section 157.23 through 157.30

Sections 157.23 through 157.30 shall be applicable to independent producers as defined in Section 154.91 of this chapter, but with the exception of 157.30, shall not apply to those inde-

[618] Mineral Interest Owners do not believe this conclusion is in any way altered by that part of paragraph (c) of Section 157.40 which provides that the small producer regulations "shall not apply to any jurisdictional sale made by a small producer where the gas reserves relating thereto were acquired by the purchase of developed reserves in place from a large producer." Mineral Interest Owners did not "purchase" the reserves attributable to their reversionary fee simple mineral estate. No money or other consideration flowed from Mineral Interest Owners to anyone in exchange for the gas attributable to their reversionary fee simple mineral estate. By like token, no instrument of transfer exists between Mineral Interest Owners and another entity. In short, there does not exist a single factor that would support the conclusion that Mineral Interest Owners "purchased" their reversional fee simple mineral estate from a large producer. There is simply no evidence—much less substantial evidence—or soundly based findings to support the Commission's holding that as small producers, Mineral Interest Owners are required to make new rate filings substituting them for Gulf before they are entitled to collect the price provided in their interim agreement with El Paso dated August 4, 1975.

Even if the Commission should determine that Mineral Interest Owners had, in some sense, "purchased"

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pendent producers who are subject to 157.40.
It is further provided in Section 157.40(c) as follows:

"(c) *Exemption under blanket certificate.* Small producers certificated hereunder shall be authorized to make small producer sales nationwide pursuant to existing and future contracts at the price specified in each such contract."

the gas attributable to their reversionary fee simple estate from a large producer, under the Commission's own orders they would not be required to make any filings. In Order No. 428-B, the Commission made it clear that its blanket exemption of small producers *is* applicable to developed reserves acquired by the small producer prior to the issuance of Order No. 428. In the words of the Commission:

> Finally, the blanket certificate authorization is applicable to jurisdictional sales made by a small producer from gas reserves acquired [619] prior to the issuance of Order No. 428 by the purchase of developed reserves in place from a large producer. The problem sought to be solved in Section 157.40(c) by the exclusion from blanket authorization of sales from certain gas reserves has no applicability to previously acquired reserves.

"Order Modifying Order No. 428 and Denying Applications for Rehearing," 46 F.P.C. 47, 52-53 (Order No. 428-B) (July 15, 1971). Mineral Interest Owners have owned their reversionary interest since long before the issuance of Order 428 on March 18, 1971. As a matter of law, Mineral Interest Owners' reversionary interest has existed as a separate entity since its creation on July 14, 1925.[9]

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[9] *See Haile v. Holtzclaw*, 414 S.W.2d 916, 924 (Tex. 1967); *Union Electric Co. v. Slay Bulk Terminals, Inc.*, 475 S.W.2d 136 (Mo. Ct. App—St. Louis 1971); *Glenn v. Holt*, 229 S.W. 684 (Tex. Civ. App.—El Paso, 1921, no writ history); *Haby v. Stanolin Oil & Gas Co.*, 228 F.2d 298, 305, 5th Cir. 1955); *Katz v. Bakke*, 265 S.W.2d 686 (Tex. Civ. App.—San Antonio 1954. error ref'd.) Simes & Smith, THE LAW OF FUTURE INTERESTS, § 82 at page 65 (2nd edition 1956).

As a matter of policy, there is likewise no reason why small producer treatment should not be extended to the gas attributable to Mineral Interest Owners' reversionary fee simple mineral estate. It is clear from Order Nos. 428 and 428-B that the Commission was concerned with and wished to preclude large producers from avoiding regulation and receiving a higher price for their gas by selling developed reserves in place to small producers.[10]

In the case of Mineral Interest Owners, there is no question that their reversionary fee simple estate was not "purchased" in order for a large producer to circumvent [620] regulation. Indeed, Mineral Interest Owners' rights existed long before the existence of any small producer regulations. Gulf did not, of course, "sell" anything to Mineral Interest Owners in order to avoid regulation or to receive a higher price for its

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[10] In order No. 428, the Commission gave the following reason for not exempting developed reserves acquired from large producers:

> The New York Commission contends that the proposed exemption may open the way for large producers to sell their gas in interstate commerce free from Commission regulation by selling their reserves in place to small producers, who would in turn resell the reserves under a conventional (exempt) sales contract to an interstate pipeline. To forestall this possibility, we shall provide that the exemption authorization here for small producers shall not apply to jurisdictional sales made by them for the gas reserves relating thereto were acquired by the purchase of developed reserves in place from a large producer. In such circumstances, the small producer will be required to obtain separate certificate authorization.

"Order Establishing Blanket Certificate Procedure for Small Producer Sales and Providing Relief from Detailed Filing Requirement," 45 F.P.C. 454, 455-456 (Order No. 428) (Mar. 18, 1971).

gas than it would have otherwise been entitled to receive.

Mineral Interest Owners firmly believe that, even if it is ultimately determined that they must make deliveries of their gas in interstate commerce, no rate filings are required for them to receive and collect the price prescribed in the interim agreement of August 4, 1975. This conclusion was apparently concurred in by El Paso, who can hardly be considered an ally of Mineral Interest Owners in this proceeding, since it has never once been suggested by El Paso that rate filings would be required of Mineral Interest Owners.[11] Under the compulsion of Opinion 737-A and in order to protect their interests, however, Mineral Interest Owners are, contemporaneous with the filing of this Application for Rehearing, filing rate schedules with respect to each of the interim agreements entered into between the various Mineral Interest Owners and El Paso. These rate [621] filings are being made under protest and with the express reservation that they are without prejudice to this application for rehearing and the petition for review will be withdrawn in the event the Commission orders on rehearing that no rate filings need be made by Mineral Interest Owners. Mineral Interest Owners are also filing a motion with these rate schedules requesting the Commission file these rate schedules *nunc pro tunc* as of July 14, 1975.

Conclusion

For each and all of the foregoing reasons, Mineral Interest Owners respectfully pray that the Commission grant this Application for Rehearing of Opinion 737-A

[11] See footnote 6, *Supra*.

in accordance with the grounds and reasons set forth above and upon rehearing issue an order declaring that Mineral Interest Owners are not obligated to make any rate filings with respect to deliveries to El Paso of casinghead gas attributable to Mineral Interest Owners' fee simple mineral estate in certain properties located in Crane County, Texas.

Respectfully submitted,

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Date: October 2, 1975

[622] (Verification Omitted in Printing)

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[623]
(Certificate of Service Omitted in Printing)

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[624] UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

Response of Texaco Inc. to Application of Mineral Interest Owners for Rehearing of Limited Aspects of Opinion No. 737-A

Texaco Inc. (Texaco), pursuant to Section 1.9 of the Rules of Practice and Procedure [1] hereby files its response to the application of Mineral Interest Owners for rehearing of limited aspects of Opinion No. 737-A filed October 2, 1975 in these proceedings.

Mineral Interest Owners seek, *inter alia,* to have clarified certain language appearing at page 6 of Opinion No. 737-A issued September 3, 1975 which reads as follows:

> "In our opinion the letter agreement misconceives the legal situation of the parties. Deliveries to El Paso must continue to be made by Gulf and Phillips as before the termination of the leases until new rate filings are made in accordance with the Commission's Regulations

[1] Mineral Interest Owners recognize that the Commission's Rules do not provide for an application for rehearing of an order denying rehearing. Section 1.34 of the Commission's Rules also do not provide for response to an application for rehearing. However, should the Commission characterize Mineral Interest Owners' pleading as a petition for clarification or reconsideration, responses are appropriate under Section 1.9 of the Commission's Rules.

> substituting Southland, Exxon and other parties [625] for those originally serving El Paso, unless permission is obtained from the Commission to abandon the service to El Paso. We observe further that until appropriate rate filings are made by Southland and other mineral interest owners we cannot resolve the issues raised by the agreement of August 4, 1975. Because of the Court order, however, putting in effect protective language to cover the situation where gas deliveries to El Paso continue, we think it appropriate to adopt this same language, as El Paso requests in its application for rehearing, to cover the period until our order becomes final."

In its pleading (pp. 3-5) Mineral Interest Owners note that the Commission in this paragraph expresses its opinion that without rate schedule filings by the Mineral Interest Owners, Exxon Corporation (Exxon) and Texaco, the prior sales by Phillips Petroleum Company (El Paso) are still in existence. The Commission, however, also granted El Paso's application for rehearing and provides in Ordering Paragraph (B) in Opinion No. 737-A for protective relief to the Mineral Interest Owners, Exxon and Texaco as had the United States Court of Appeals for the Fifth Circuit earlier in these proceedings.

Like the Mineral Interest Owners, Texaco views the protective orders issued by the court and now by the Commission as having effectively stayed the jurisdictional findings of Opinion Nos. 737 and 737-A which would otherwise require filings by Texaco and the other producers. The protective language adopted

by both the court and the Commission clearly indicates that the gas at issue can be delivered to El Paso by Texaco, and the other affected parties, during the pendency of review of these orders without jurisdictional projudice to any party's position on the merits. Procedures are provided for the return of [626] gas to Texaco and the other parties in the event that their position that said gas has not been committed to interstate commerce is affirmed ultimately upon judicial review. The order also contemplates that a price will be applied to volumes delivered to El Paso during judicial review, and the return of such volumes to the producers if they are ultimately successful.

In these circumstances Texaco believes that the Commission's Opinion No. 737-A does not require the formal filing of its interim agreement with El Paso which Texaco and El Paso executed in order to implement the protective relief provisions first granted by the court of appeals. This protective relief was explicitly granted to maintain the *status quo* between the various parties and the Commission, preventing *all* from asserting their respective positions during the pendency of this proceeding. For the Commission to begin now to regulate these sales by requiring rate schedule filings is contrary to the spirit and expressed purpose of such protective relief.

Because Texaco recognizes the ambiguity in the above-quoted language of the Commission, however, Texaco is contemporaneously forwarding to the Commission a copy of the interim agreement which it has made with El Paso in implementation of the protective relief provisions of the court and now the Commission. Texaco continues in its position that the

Commission erred in Opinion Nos. 737 and 737-A and has sought judicial review of the Commission's opinions, which proceeding is presently pending in the United States Court of Appeals for the Fifth Circuit, No. 75-3682. By providing the Commission with this agreement Texaco in no way concedes that the Commission has any regulatory jurisdiction in these premises.

If contrary to the above, the Commission concludes that Opinion No. 737-A compels Texaco to make a *pro forma* rate schedule filing, then Texaco, in order to protect its interests, requests that its interim agreement be deemed effective *nunc pro tunc* as of August 8, 1975, the day Texaco's interest in the gas in question arose. In these circumstances, such filing is made under protest and duress and without prejudice to any action Texaco may take in any appropriate court of law.

[627] CONCLUSION

For the reasons stated above, Texaco supports the position stated by Mineral Interest Owners in its October 2, 1975 pleading with respect to the proper interpretation of the above-quoted language of Opinion No. 737-A relating to rate schedule filings and the effect of the Commission's protective relief granted therein.

Respectfully submitted,

TEXACO INC.
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By /s/ KIRK W. WEINERT
Kirk W. Weinert
Attorney for Texaco Inc.

Houston, Texas
October 17, 1975

[628] (VERIFICATION OMITTED IN PRINTING)

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[629]

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

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[630] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; William L. Springer, Don S. Smith, and John H. Holloman III.

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

(ISSUED OCTOBER 31, 1975)

Order Granting Rehearing for Purposes of Further Consideration on Limited Issues Relating to Filing Requirements

Mineral Interest Owners[1] on October 3, 1975, filed an application for rehearing with respect to the Commission's Opinion No. 737-A and Order issued September 3, 1975. They contend that the Commission in Opinion No. 737-A erred in holding that deliveries to El Paso must continue to be made by leaseholders Gulf and Phillips until new rate filings are made by Southland, Exxon and other parties unless permission is obtained to abandon service and that the Commission erred in holding that issues were raised by the agreement of August 4, 1975, between El Paso and Southland and cannot be resolved until appropriate rate filings are made.

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[1] Southland Royalty Company, William Y. Penn, *et al.*, Trustees, Nancy Elizabeth Penson, Penn Resources, Inc., Elizabeth Hudson Penn, Trustees under the will of Warren Wright deceased.

On October 20, 1975, Texaco Inc. purportedly pursuant to Section 1.9 of the Commission's Rules of Practice and Procedure filed a response to the application of the Mineral Interest Owners for rehearing. Our rules do not permit answers to petitions for rehearing (see Section 1.34(d)), but since Texaco's response takes issue with Opinion No. 737-A rather than the Mineral Interest Owners, we shall consider it an application for reconsideration.

We shall grant rehearing for purposes of further consideration to Mineral Interest Owners and shall defer consideration of Texaco's application for reconsideration.

[631] We grant rehearing for the purpose of further consideration only inasmuch as the record in this case has been docketed in the Fifth Circuit Court of Appeals, depriving us of jurisdiction to modify the orders under review. We have instructed our Solicitor to seek remand of the record for the limited purpose of considering the issues presented by the pending applications for rehearing and reconsideration.

The Commission finds:

The Application for Rehearing filed by Mineral Interest Owners on October 3, 1975, should be granted for further consideration and consideration of Texaco's application should be deferred.

The Commission orders:

The Application for Rehearing filed by Mineral Interest Owners on October 3, 1975, is hereby granted for further consideration on the limited issues re-

ferred to above, and consideration of Texaco's application is deferred.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

[632] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION No. 737-B

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

(ISSUED: DECEMBER 18, 1975)

DC-51

Opinion and Order Granting Rehearing on Limited Issue Relating to Filing Requirements

[633] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

OPINION No. 737-B

Docket No. CP75-209

EL PASO NATURAL GAS COMPANY

Docket No. CI75-594

TEXACO INC.

(Issued December 18, 1975)

Opinion and Order Granting Rehearing on Limited Issue Relating to Filing Requirements

PER CURIAM:

Mineral Interest owners[1] on October 3, 1975, filed an application for rehearing with respect to the Commission's Opinion No. 737-A and Order issued September 3, 1975. In that Opinion the Commission denied rehearing of Opinion No. 737 but adopted protective relief in case the Commission's order was reversed on appeal. In Opinion No. 737 the Commission determined that owners holding reversionary interests in certain gas reserves in Crane and Ector Counties,

[1] Southland Royalty Company (Southland) William Y. Penn, *et al.*, Trustees, Nancy Elizabeth Penson, Penn Resources, Inc., Elizabeth Hudson Penn, Trustees under the will of Warren Wright deceased.

Texas were subject to the dedications made by the leaseholders, Gulf Oil Corporation and others for the sale of gas in interstate commerce to El Paso Natural Gas Company and that, upon termination of the leases, such owners might not sell the dedicated gas in intrastate commerce without obtaining abandonment approval under Section 7(b) of the Natural Gas Act. Mineral Interest Owners contend that the Commission in Opinion No. 737-A erred in holding that deliveries to El Paso must continue to be made by leaseholders Gulf and Phillips until new rate filings are made by Southland, Exxon and other parties unless permission is obtained to abandon service and that the Commission erred in holding that issues were raised by the agreement of August 4, 1975, between El Paso and Southland and cannot be resolved until appropriate rate filings are made.

[634] On October 20, 1975, Texaco Inc. filed a response to the application of the Mineral Interest Owners for rehearing, which we have accepted as an application for reconsideration as explained in our order of October 31, 1975. In that order we granted rehearing for purposes of further consideration inasmuch as the record had been docketed in the United States Court of Appeals for the Fifth Circuit, depriving us of jurisdiction. However, on November 25, 1975, the Court granted the Commission's motion for a limited remand for purposes of further consideration.

As Mineral Interest Owners point out, we took notice of the Southland-El Paso letter agreement providing protective provisions and other terms for the continued delivery of gas to El Paso. We noted particularly that where Southland is compelled to

deliver gas to El Paso by Opinion No. 737 the initial rate would consist of 76.5 cents per Mcf or 150 percent of the national rate. The Mineral Interest Owners object to our concluding language that:

> In our opinion the letter agreement misconceives the legal situation of the parties. Deliveries to El Paso must continue to be made by Gulf and Phillips as before the termination of the leases until new rate filings are made in accordance with the Commission's Regulations substituting Southland, Exxon and other parties for those originally serving El Paso, unless permission is obtained from the Commission to abandon the service to El Paso. We observe further that until appropriate rate filings are made by Southland and other mineral interest owners we cannot resolve the issues raised by the agreement of August 4, 1975. Because of the Court order, however, putting in effect protective language to cover the situation where gas deliveries to El Paso continue, we think it appropriate to adopt this same language, as El Paso requests in its application for rehearing, to cover the period until our order becomes final.

Mineral Interest Owners believe that this language is confusing as to whether they are required to make rate filings. They also contend that as small producers defined in Section 157.40 of the Commission's Regulations they are not required to make any rate filings with respect to their deliveries to El Paso.

[635] Texaco, which is plainly not a small producer but holds a reversionary interest in the Ector County

leasehold, in its application for reconsideration views the protective orders issued by the Court and now by the Commission as having stayed the jurisdictional findings of Opinion Nos. 737 and 737-A, which would otherwise require filings by Texaco and other producers. It notes that the protective language indicates that the gas at issue can be delivered to El Paso by Texaco and other affected parties during the pendency of review without jurisdictional prejudice to any party's position. In these circumstances Texaco believes that the Commission's Opinion No. 737-A does not require the formal filing of its interim agreement with El Paso. We agree with Texaco's reasoning as applied to the period of the Commission and Court stay. Therefore, it is our opinion that it is not required to make rate schedule or certificate filings with respect to sales from its reversionary interest. The same result would apply to Exxon, which holds a reversionary interest in the Crane County leasehold.

With respect to Mineral Interest Owners, regardless of whether they are small producers, it is our opinion that they are likewise not required to make rate schedule and certificate filings with respect to their sales of gas from the reserves here involved because of the protective orders by us and by the Court as agreed by Texaco. Certain of the owners of reversionary interests have made rate schedule filings of their interim agreements with El Paso. These filings would, of course, be unnecessary at this time.

The Commission further finds:

Opinion No. 737-A and Order should be modified in accordance with the above discussion.

The Commission orders:

The applications for rehearing of the Mineral Interest Owners filed October 3, 1975, and for reconsideration of Texaco filed October 20, 1975, are granted in accordance with the above discussion.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(TITLE OMITTED IN PRINTING)

Reference of the Judgment of the Court of Appeals for the Fifth Circuit

(Dated December 13, 1976)

The Opinion of the Court of Appeals for the Fifth Circuit in this case, 543 F.2d 1134 (5th Cir. 1976), has been reproduced as:

1. Appendix B, pages 2-12, in the Petition for a Writ of Certiorari No. 76-1114, *California, et al.*, v. *Southland Royalty Company, et al.*
2. Appendix B, pages 3a-11a, in the Petition for a Writ of Certiorari No. 76-1133, *El Paso Natural Gas Co.* v. *Southland Royalty Co., et al.*
3. Appendix A, pages 1a-11a, in the Petition for a Writ of Certiorari No. 76-1587, *Federal Power Commission* v. *Southland Royalty Co., et al.*

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(TITLE OMITTED IN PRINTING)

Reference of the Judgment of the Court of Appeals for the Fifth Circuit

(Dated December 13, 1976)

The Judgment of the Court of Appeals for the Fifth Circuit has been reproduced as:

1. Appendix A, in the Petition for a Writ of Certiorari No. 76-1114, *California, et al* v. *Southland Royalty Co., et al.*
2. Appendix A, pages 1a-2a, in the Petition for a Writ of Certiorari No. 76-1133, *El Paso Natural Gas Co.* v. *Southland Royalty Co., et al.*
3. Appendix B, pages 12a-13a, in the Petition for a Writ of Certiorari No. 76-1587, *Federal Power Commission* v. *Southland Royalty Co., et al.*

IN THE
SUPREME COURT OF THE UNITED STATES

76-1114

CALIFORNIA, ET AL. v. SOUTHLAND ROYALTY CO., ET AL.

76-1133

EL PASO NATURAL GAS CO. v.
SOUTHLAND ROYALTY CO., ET AL.

76-1587

FPC v. SOUTHLAND ROYALTY CO., ET AL.

The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument. Mr. Justice Stewart and Mr. Justice Powell took no part in the consideration or decision of these petitions.

[June 27, 1977]